





# San Francisco Law Library

No. 76671

Presented by


---

## EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.





Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov







United States 1121  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

---

**Transcript of Record.**

---

Upon Writ of Error to the United States District  
Court of the District of Nevada.

---

FILED

NOV 8 - 1917

F. D. MONCKTON,  
CLERK.







**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

---

**Transcript of Record.**

---

Upon Writ of Error to the United States District  
Court of the District of Nevada.

---





# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of Reta S. Arkell of Service of Bill of	
Exceptions .....	323
Amended Answer .....	9
Assignment of Error.....	52
Certificate of Clerk U. S. District Court to Tran-	
script of Record.....	324
Certificate of U. S. District Judge to Bill of Ex-	
ceptions, etc. ....	319
Citation on Writ of Error.....	325
Claimant's Statement No. 1—Proof of Death..	308
Complaint .....	1
Demurrer .....	6

## EXHIBITS:

Exhibit "A" to Complaint—Policy of In-	
surance .....	4
Plaintiff's Exhibit "A"—Policy of Insur-	
ance .....	306
Plaintiff's Exhibit "B"—Statements.....	308
Plaintiff's Exhibit "D"—Photograph .....	314
Plaintiff's Exhibit "E"—Photograph .....	315
Plaintiff's Exhibit "F"—Photograph .....	316
Defendant's Exhibit No. 2—Photograph...	317
Defendant's Exhibit No. 3—Photograph...	318
Friend's Statement No. 3—Proof of Death	312

Index.	Page
Judgment .....	17
Notice of Motion and Petition for New Trial...	44
Notice of Motion to Make Complaint More Specific and Certain .....	7
Opinion on Motion for New Trial.....	18
Order Allowing Motion for New Trial, etc. ....	50
Order Denying Petition for a New Trial.....	51
Order Directing Transmission to Appellate Court of Certain Original Exhibits.....	322
Order Extending Time to File Record to October 1, 1917 .....	324
Order Extending Time to File Record and Docket Cause to October 1, 1917.....	336
Order Overruling Demurrer, Dated and Entered August 2, 1915 .....	9
Order Retaining Jurisdiction .....	50
Order Staying Execution .....	43
Order Staying Execution and Extending Time for Filing Petition or Motion for New Trial and for Bill of Exceptions.....	43
Petition for Writ of Error.....	68
Petition or Motion for New Trial.....	45
Physician's Statement No. 2—Proof of Death.	310
Proceedings Had March 6, 1916 .....	72
Reply .....	14
Stipulation and Statement In Re Printing Record, in Above-entitled Case, Under Rule 23.	328
TESTIMONY ON BEHALF OF PLAINTIFF:	
ADAMS, BREWSTER (In Rebuttal)...	258
ASHER, Dr. J. A. (In Rebuttal).....	263



Index.

Page

TESTIMONY ON BEHALF OF PLAIN-

TIFF—Continued:

Cross-examination .....	267
Redirect Examination .....	274
BURKE, A. A. (In Rebuttal).....	229
Cross-examination .....	236
CHICK, F. O. (In Rebuttal).....	238
COOL, RAY J. (In Rebuttal).....	220
Cross-examination .....	225
CURNOW, NICHOLAS (In Rebuttal)....	245
Cross-examination .....	249
In Rebuttal .....	261
DANN, F. P. (In Rebuttal).....	217
HARRIS, W. J. (In Rebuttal).....	253
Cross-examination .....	254
Redirect Examination .....	254
Recross-examination .....	255
KEPNER, Mrs. MAY (In Rebuttal).....	279
NEASHAM, JAMES EDWARD (In Re-	
buttal) .....	244
NEASHAM, Mrs. MATILDA C. ....	76
In Rebuttal .....	281
PETERSON, VERDI (In Rebuttal).....	276
RAYMOND, Mrs. MYRTLE (In Rebuttal)	238
Cross-examination .....	242
Redirect-examination .....	243
WOOD, HARRY B. (In Rebuttal).....	256

TESTIMONY ON BEHALF OF DEFEND-  
ANT:

CHICK, F. O. ....	170
Cross-examination .....	180

## Index.

Page

TESTIMONY ON BEHALF OF DEFEND-  
ANT—Continued:

Redirect Examination.....	185
Recross-examination .....	186
COLLINS, FRANK .....	110
Recalled .....	128
Cross-examination .....	128
Redirect Examination .....	141
Recross-examination .....	142
FERRELL, C. P. ....	149
Cross-examination .....	163
Redirect Examination .....	169
Recross-examination .....	169
GIBSON, Dr. S. C. ....	191
Cross-examination .....	203
HAMMERSMITH, GEORGE N. ....	88
Cross-examination .....	90
HILL, HARRY .....	126
Cross-examination .....	127
MORRISON, Dr. S. K. ....	206
Cross-examination .....	211
NEASHAM, Mrs. MATILDA C. ....	147
NEASHAM JAMES EDWARD .....	123
Cross-examination .....	125
READ, THORNTON A. ....	144
UNSWORTH, F. K. ....	92
Cross-examination .....	104
Verdict .....	16
Writ of Error.....	326

*In the Second Judicial District Court of the State  
of Nevada, in and for the County of Washoe.*

Action on Life Policy No. 4,707,986.

MATILDA C. NEASHAM,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant.

**Complaint.**

Plaintiff complains of defendant and alleges:

I. That at all times hereinafter stated defendant has been a corporation organized under the laws of the State of New York and authorized to transact business in the State of Nevada, and having and maintaining a Branch Office in the city of Reno, in the county of Washoe, State of Nevada.

II. That heretofore, to wit, on the tenth day of July, A. D. 1914, at Reno, in the county of Washoe, State of Nevada, defendant, in consideration of the payment of the annual premium of four hundred fifty-six and 90/100 dollars (\$456.90), executed and delivered its policy of life insurance numbered 4,707,986, on the life of her husband, William C. Neasham, wherein and whereby defendant promised and agreed to pay plaintiff the sum of Ten Thousand Dollars (\$10,000) upon due proof of the death of said William C. Neasham, a copy of which said policy, together with the endorsements thereon, marked Exhibit "A," is hereto attached and made a part of this complaint.

III. That on the 27th day of February, A. D.



1915, said insured William C. Neasham, husband of the plaintiff, died.

IV. That thereafter, to wit, on the fifteenth day of March, A. D. 1915, plaintiff furnished defendant with due proof of the death of her husband, said William C. Neasham, the insured in said policy of insurance.

V. That at the time said policy of insurance was executed and delivered, and at the time of the death of said insured plaintiff was the wife of said insured and had a valuable interest in the life of said insured.

VI. That plaintiff has performed all of the conditions of said policy of insurance on her part to be performed. [1\*]

VII. *That plaintiff has performed all of the conditions of said policy of insurance on her part to be performed.*

VIII. That defendant has not paid said sum of Ten Thousand Dollars (\$10,000), or any part thereof, and that said sum of Ten Thousand Dollars (\$10,000) has been due and payable even since the fifteenth day of March, A. D. 1915.

WHEREFORE, plaintiff demands judgment against said defendant for the sum of Ten Thousand Dollars (\$10,000), with interest thereon since the fifteenth day of March, A. D. 1915, together with her costs and disbursements herein expended.

THOMAS E. KEPNER,  
Attorney for Plaintiff,  
Journal Building,  
Reno, Nevada.

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

State of Nevada,  
County of Washoe,—ss.

Matilda C. Neasham, being first duly sworn, on her oath deposes and says: I am plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof; that the same is true.

MATILDA C. NEASHAM.

Subscribed and sworn to before me this 30th day of April, A. D. 1915.

[Notarial Seal]      THOMAS E. KEPNER,  
Notary Public, in and for the County of Washoe,  
State of Nevada. [2]

**Exhibit "A" to Complaint—Policy of Insurance.**

NEW YORK

LIFE

INSURANCE COMPANY

By This Policy of Insurance Agrees to Pay

\*\*\* TEN THOUSAND \*\*\* Dollars

Face  
Amount of  
the Policyat the Home Office of the Company in the City and  
State of New York to Matilda C., wife of the insured

Beneficiary

\*\*\*\* , Beneficiary, (with \*\* the right on the part of  
the Insured to change the Beneficiary as hereinafter  
provided) upon receipt at said Home Office of due  
proof of the death during the continuance of this  
contract, of \*\*\* WILLIAM C. NEASHAM \*\*\* the  
Insured.

Insured

This insurance is granted in consideration of the  
payment of the first premium

Premium

of \*\* Four hundred fifty-six 90/100 \*\*\* Dollars

How and  
When  
Payablethe receipt of which is hereby acknowledged, con-  
stituting payment for the period terminating on the  
Tenth day of July in the year Nineteen Hundred  
and fifteen and the payment of a like sum on said  
date and on the Tenth \*\* day of July \*\* in every  
year thereafter during the continuance of this Policy  
until the death of the Insured.Incontest-  
abilityThis policy is free of conditions as to residence,  
travel, occupation, or military or naval service, and  
shall be incontestable after one year from its date  
of issue except for nonpayment of premium. After  
its delivery to and receipt by the Insured this Policy



Date Policy  
takes Effect

takes effect as of the Tenth day of July Nineteen Hundred and fourteen.

The benefits and provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the NEW-YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Twenty-third day of July, Nineteen Hundred and fourteen.

Examined  
W.  
D.  
M. O. L.  
913-1

DARWIN P. KINGSLEY,  
President.

SEYMOUR M. BALLARD,  
Secretary.

Age 48.

\_\_\_\_\_,  
Registrar.

Insurance Payable at Death: Premiums Payable  
During Life: Annual Dividend.

\* \* \* \* \*

**SELF-DESTRUCTION.**—In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more. [3]

[Endorsed]: Original. Hon. Thomas F. Moran. No. 10,842. In the Second Judicial District Court of the State of Nevada in and for Washoe County. Matilda C. Neasham, Plaintiff, vs. New York Life Insurance Co., Defendant. Complaint. Due service of the within by copy, admitted — 191—. ———, Attorney for ———. Filed this 30th day of April, 1915. W. A. Fogg, Clerk. By S. R. Tippet, Deputy. Thomas E. Kepner, Reno, Nevada, Attorney for Plaintiff.

No. 1967. U. S. Dist. Court, Dist. of Nevada. Filed June 8, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [4]

---

[Title of Court and Cause.]

### **Demurrer.**

Comes now, New York Life Insurance Company, a corporation, by its attorneys, Cheney, Downer, Price & Hawkins, and demurs to the complaint filed herein, and as grounds for said demurrer states:

1. That the complaint is ambiguous and uncertain in that it does not appear from said complaint whether the insured, William C. Neasham, was or was not guilty of self-destruction.

2. That the complaint does not state facts sufficient to constitute a cause of action.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendant.

I, the undersigned, of counsel for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

PRINCE A. HAWKINS,  
Of Counsel for Defendant.

[Indorsed.] [7]

---

[Title of Court and Cause.]

**Notice of Motion to Make Complaint More Specific and Certain.**

To the Above-named Plaintiff, Matilda C. Neasham,  
and to Thomas E. Kepner, Her Attorney:

You and each of you are hereby notified: That the above-named defendant will, on the 2d day of August, 1915, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the District Court room in the above-entitled court in Carson City, Nevada, apply to the Court and move for an order herein as follows:

Requiring the plaintiff to make her complaint more specific and certain by stating whether the insured, William C. Neasham, was or was not guilty of self-destruction. Said motion to require the complaint to be made more specific and certain will be made upon the following grounds: That the complaint is too general in its terms to be readily understood,—for the following reasons, to wit: Plaintiff demands judgment against defendant for the sum of \$10,000, with interest thereon from March 15, 1915, together with her costs and disbursements. The cause of action is founded upon a written con-



tract, a copy of which, marked Exhibit "A," is attached to and made a part of plaintiff's complaint.

The said contract bears date July 23, 1914, and it is alleged to have been executed and delivered on July 10, 1914. It is also alleged that said insured, William C. Neasham, died on the 27th day of February, 1915, which said date was "during the first insurance year." The said contract, or [8] life insurance policy, and all parts thereof and statements therein are binding upon plaintiff. The said contract, in part, see pages 7 and 8, reads as follows:

"Self-Destruction. In event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more."

Plaintiff demands judgment for the largest amount possible under the contract, when if required to make the complaint more specific and certain, as above requested, defendant may only be liable, under the facts so stated, for a sum equal to the first premium, and no more, which said first premium amounts to the sum of \$456.90, as stated in paragraph II of the complaint.

That upon the hearing of said motion, as above mentioned, defendant will use and rely upon this notice of motion, and the complaint filed in the above-entitled action.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendant.

[Indorsed.]

[Title of Cause.]

**Order Overruling Demurrer, Dated and Entered  
August 2, 1915.**

It appearing to the Court that on the 7th day of July, last, the defendant filed herein its demurrer and motion to make the complaint more specific, the same having been previously served upon counsel for the plaintiff; and the same having been regularly called this day, and no counsel for the defendant appearing,

Now, on motion of Mr. Kepner, attorney for plaintiff, it is ordered that the demurrer be, and is hereby, overruled, and the motion denied, without an examination of the record, as provided by Rule 42 of this court; and that the defendant have twenty days to answer the complaint. [9]

---

[Title of Court and Cause.]

**Amended Answer.**

Comes now the above-named defendant, New York Life Insurance Company, a corporation, and by leave of Court first had and obtained, filed herein its amended answer, and for answer to the plaintiff's complaint, upon information and belief, says:

1. That the defendant admits the allegations contained in paragraph numbered I of said complaint,—except the defendant denies that it maintains a branch office in the city of Reno, and in that connection alleges that the defendant maintains an office in the city of Reno, but said office is an office of and

with special and limited powers, authority and jurisdiction.

2. That the defendant denies that on, to wit, the 10th day of July, 1914, or at any other time, at Reno, in the county of Washoe, State of Nevada, or elsewhere, the defendant, in consideration of the payment of the annual premium of \$456.90, or on any other consideration, executed and delivered, or executed or delivered to the plaintiff its policy of life insurance on the life of her husband, William C. Neasham. The defendant admits that it made a policy of insurance, which was numbered 4,707,986 on the life of said William C. Neasham, but it denies that it made or delivered the same to the plaintiff or that it therein or thereby promised and agreed, or promised or agreed, to pay the plaintiff \$10,000 upon due proof of the death of said William C. Neasham. And in that behalf, the defendant alleges that in and by the terms of said policy, in the event of self-destruction during the first insurance year, whether the insured was sane or insane, the insurance under said policy shall be a sum equal to the premiums thereon which have been paid to and received by the defendant, and no more.

That the insurance year under said policy commenced on the 10th day of [10] July, 1914, and that during the first insurance year, and on, to wit, the 27th day of February, 1915, said William C. Neasham, the person named as the insured in said policy, destroyed himself and there and then died as the result of a self-inflicted gunshot wound; that thereupon said defendant, upon receipt at its home



office, which is in the city of New York, of due proof of the death of said insured, became, by the terms of said contract, obligated to pay to the plaintiff a sum equal to the premiums thereon which had been paid to and received by the defendant, and no more.

That in truth and in fact said defendant never received any sum whatever as premium on said policy, or otherwise, and said person named therein as the insured never paid or caused to be paid to said defendant any sum of money whatever, nor was any premium, or any part thereof, paid to or received by defendant on or on account of said policy.

3. That the defendant denies each and every of the allegations contained in paragraphs numbered III, IV, and VI of plaintiff's complaint, as therein stated, and alleges that the matters therein referred to are not except as herein stated.

4. That the defendant denies each and every allegation contained in paragraph numbered VII of the complaint, except the defendant admits that it has not paid said sum of \$10,000, or any part thereof. The defendant denies that said sum of \$10,000, or any sum or amount, has been due and payable, or due or payable, since the 15th day of March, 1915, or at any time or date; and denies that it is indebted to the plaintiff in any sum or amount whatsoever.

For an affirmative and separate defense to the alleged cause of action set forth in plaintiff's complaint, defendant, upon information and belief, alleges:

1. That it made a policy of insurance which was numbered 4,707, 986, on the life of said William C.

Neasham; that said policy, in part, reads as follows:

“Self-Destruction.—In the event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under the policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more.”

That the insurance year under said policy commenced on the 10th day of July, 1914, and that during the first insurance year, and on, to wit, the 27th [11] day of February, 1915, said William C. Neasham, the person named as the insured in said policy, was discovered dead, with a gunshot wound in the roof of his mouth. That said William C. Neasham, the person named as the insured in said policy, on the 27th day of February, 1915, destroyed himself, and then and there died as the result of a self-inflicted gunshot wound.

2. That thereupon said defendant upon receipt at its home office, which is in the city of New York, or due proof of the death of said insured, became, by the terms of said contract or policy numbered 4,707,986, obligated to pay to the plaintiff a sum equal to the premiums thereon which had been paid to and received by the defendant, and no more; that in truth and in fact, said defendant never received any sum whatever as premium on said policy, or otherwise, and said person named therein as the insured never paid or caused to be paid to said defendant any sum of money whatever, nor was any premium or any part thereof, paid to or received by the defendant on or on account of said policy

3. That said policy No. 4,707,986, in part, reads as follows:

“Miscellaneous provisions. The policy and the application therefor constitute the entire contract between the parties. \* \* \*”

“No agent is authorized to waive forfeitures, or to make, modify or discharge contracts, or to extend the time for paying a premium.”

The said application for and attached to said policy and made a part of the said contract, in part, reads as follows:

“I agree as follows: I. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime.  
\* \* \*

That the first premium, nor any part thereof, was not paid during the lifetime of the applicant, William C. Neasham; that neither the first premium or any part thereof or any payment was paid or made when due, or during the lifetime of the said applicant, William C. Neasham, or before the delivery of said policy, or at any time.

WHEREFORE, said defendant, having fully answered plaintiff's complaint, prays that said complaint be dismissed and that it may recover its costs and disbursements herein.

CHENEY, DOWNER, PRICE & HAWKINS,  
Attorneys for Defendant.

JAMES H. McINTOSH,  
Of Counsel.

[Indorsed.] [12]



[Title of Court and Cause.]

**Reply.**

And now comes said plaintiff and for her reply to the amended answer of the defendant company heretofore served and filed, denies and alleges:

I. Plaintiff denies each and every allegation and each and every part of each and every allegation of new matter in said amended answer contained not hereinafter specifically admitted, qualified or denied.

II. Plaintiff denies that either during the first insurance year, or either on the 27th day of February, 1915, or at any other time, said William C. Neasham, either destroyed himself, or either then or there died as the result of a self-inflicted gunshot wound, and in this behalf plaintiff alleges that her husband, William C. Neasham, the insured named in said contract or policy numbered 4,707,986, came to his death on February 27th, 1915, at the hands of some person or persons unknown to plaintiff.

Plaintiff denies the allegation commencing with the words "That in truth and in fact," line 26, page 2, and ending with the words "on or on account of said policy," line 31, page 2, of said amended answer.

III. Plaintiff denies that either during the first insurance year, or either on the 27th day of February, 1915, or at any other time, said William C. Neasham, either destroyed himself, or either then or there died, either as the, or a, result, of either a, or any, self-inflicted gunshot wound, and denies that either thereupon, or otherwise, said defendant either upon receipt at its home office or due proof of the

death of said insured, became, by either the terms of said contract or policy numbered 4,707,986, obligated to pay to plaintiff only a sum equal to the premiums thereon which had been paid to and received by the defendant, and or no more, and in this behalf plaintiff alleges that said defendant *com*-then and there became obligated and bound to pay plaintiff the full amount of said policy, to wit, the sum of ten thousand dollars. [14] And plaintiff denies that either in truth or in fact, or in truth and in fact, said defendant never received any sum whatever as premium on said policy, and denies the allegation "that in truth and in fact, said defendant never received any sum whatever as premium on said policy, or otherwise, and said person named therein as the insured never paid or caused to be paid to said defendant any sum of money whatever, nor was any premium or any part thereof, paid to or received by the defendant on or on account of said policy," as alleged in lines 9 to 14 inclusive, page 4, of said amended answer.

IV. Plaintiff denies the allegation "that the first premium, nor any part thereof, was not paid during the lifetime of the applicant, William C. Neasham; *the* neither the first premium or any part thereof or any payment was paid or made when due, or during the lifetime of the said applicant, William C. Neasham, or before the delivery of said policy, or at any time," as alleged in lines 26 to 31, page 4, of said answer.

V. And for a further reply to the new matter contained in said amended answer plaintiff alleges that her husband, William C. Neasham, the insured named

in said contract or policy of insurance numbered 4,707.986 came to his death on the 27th day of February, 1915, from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff.

WHEREFORE, having fully replied to the new matter contained in said amended answer plaintiff prays judgment against said defendant company for the sum of ten thousand dollars, together with interest thereon since the 15th day of March, 1915, at the rate of seven per cent per annum, and for her costs and disbursements herein expended.

THOMAS E. KEPNER,  
Attorney for Plaintiff.

[Indorsed.] [15]

---

[Title of Court and Cause.]

**Verdict.**

We, the jury in the above-entitled case, find for the plaintiff in the sum of \$10,689.30.

Dated, March 10th, 1916.

J. S. MITCHELL,  
Foreman.

[Indorsed.] [16]

*In the District Court of the United States for the  
District of Nevada.*

No. 1967.

MATILDA C. NEASHAM,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Judgment.**

This cause came on regularly for trial at the February term, 1916, of this court, on the 8th day of March, 1916, the Honorable W. C. Van Fleet, presiding. The parties appeared by their attorneys: Thomas E. Kepner, for the plaintiff; Mr. Hawkins, of the firm of Cheney, Downer, Price & Hawkins, for the defendant. A jury was impaneled and sworn to try the issue; and after hearing the evidence, oral and documentary, arguments of counsel and the instructions given by the Court, and due deliberation thereon, the jury returned their verdict in favor of the plaintiff for the sum of \$10,689.30.

It is therefore ordered that the plaintiff have and recover of and from the defendant, the sum of ten thousand six hundred and eighty-nine 30/100 dollars (\$10,689.30), with interest thereon from this date until paid at the rate of 7% per annum, together with costs of suit, taxed at \$175.72.

Dated, March 10th, 1916.

Attest: T. J. EDWARDS,

Clerk. [17]



[Title of Court and Cause.]

**Opinion on Motion for New Trial.**

Filed July 16th, 1917.

THOMAS E. KEPNER, Reno, Nevada, for Plaintiff.

CHENEY, DOWNER, PRICE & HAWKINS,  
Reno, Nevada, for Defendant.

VAN FLEET, District Judge:

This is a petition for new trial. The action is by the widow of Willam C. Neasham, deceased, to recover on a life policy issued by defendant to her husband in which she is named as beneficiary. The policy, for \$10,000, was issued July 10, 1914. It contains a stipulation avoiding it in the event of self-destruction of the assured, sane or insane, during the first insurance year. Deceased met a violent death February 27, 1915, and the defense was that he died as the result of a self-inflicted gunshot wound—a suicide. The jury found the issue against the defendant and awarded plaintiff a verdict, upon which judgment was entered; and defendant now asks that the judgment be vacated and the verdict set aside.

A number of grounds are advanced in support of the petition, the one principally pressed being insufficiency of the evidence to sustain the verdict, and as to the others, involving alleged errors in law, were maturely considered at the trial, this is the only question which now calls for consideration.

At the close of the evidence the defendant moved the Court for an instructed verdict, which was de-

nied, and this ruling is insisted upon by defendant as involving error. But recognizing the well-defined distinction in the principles applicable to a motion for an instructed verdict and those which obtain upon an application for a new trial, it is contended by defendant that assuming the evidence to be such as to justify the Court in denying the former motion there is nevertheless such an entire lack of any real, [18] substantial controversy on the question as to the cause of the death of the assured, and that the evidence preponderates so strongly in support of the defense, that it is now the imperative duty of the Court to grant the present application and set the verdict aside.

This necessitates a brief consideration of the features of the evidence bearing on the cause of death, all of which was circumstantial.

On the morning of his death the deceased, who resided with his family in Reno, was observed between eight-thirty and nine o'clock walking through town and out along the track of the Southern Pacific Company towards Sparks, and about an hour later was found in a moribund condition lying in a cut or depression by the side of the track some distance east of Reno. He was apparently unconscious when found, but was still breathing in a heavy or stertorous manner. The coroner and sheriff reached the scene some time after ten o'clock, and on their arrival found him dead. The place where the body lay was locally referred to as the "Gravel Pit" or "Oil Pit," a deep sunken way or cut along the railroad track between Reno and Sparks, with a wagon road running through it to facilitate loading and hauling oil

from an oil pipe or tank situated on the railroad right of way. The body was lying on its right side with the right arm partly extended at an angle from the body, and the left lying across the abdomen. A pistol—a Savage automatic of .32 caliber—which the evidence tended to identify as one purchased by the deceased the day before, was lying some few inches from the right hand, and an empty cartridge shell of .32 caliber was found on the ground near the body. The head was lying up the slope of the cut with the feet extending into or near the wagon track. The clothing was not in disorder, except that the hat had fallen off, and there was no evidence at the point where the body lay of any disturbance of the ground to indicate a struggle. The deceased's watch, a small sum in coin, and some other small articles were found on his person. Blood was oozing from the mouth and nostrils, and a fresh bloodstain was found on the right arm of the coat at the elbow. Investigation disclosed a wound in the back part of the throat or mouth a little to the right of the median line, leading through the soft palate and into the brain cavity, of a size sufficiently large to enable the insertion of the [19] middle finger of a man's hand, and so located as not to be visible except by opening the mouth and depressing the tongue; fractured bone could be felt in the wound, and a stellar-shaped fracture of the skull was found on the back part of the head just above and to the right of the occipital protuberance, with a small fraction of skullbone pushed out beyond the regular contour of the skull, but no exit wound through the scalp,—the fracture being on a

line a little upwards from the point of entrance of the wound in the throat. While the autopsy was not such as to definitely disclose the producing cause of the wound, the opinion of the sheriff and doctors was that the wound was from a gunshot; there was no apparent injury to the lips, teeth or tongue, and the testimony of the physicians was to the effect that the wound could not in their opinion have been caused other than by the insertion of the weapon in the mouth without injuring the adjacent organs, unless inflicted while the deceased had his mouth open in the act of yawning or retching, or crying out in agony; and that it was of a character to produce death.

These are in substance the facts relied on by defendant as making in favor of the theory of suicide, and, standing alone, they are perhaps more than ordinarily persuasive of the correctness of that theory. But they do not stand alone. Arrayed against them, or at least with them, are certain additional circumstances disclosed by the evidence, which in an effort to establish suicide purely from circumstances, must be taken into account.

In the first place, the evidence is wholly lacking in anything in deceased's situation tending to disclose motive for taking his own life. He was in what may be termed fairly easy financial circumstances. He was a rancher and stockman, owning a large ranch with stock and other personal property and having his home in Reno. His ranch was under mortgage for \$15,000, but the loan was not due for nearly a year and a half, and the evidence tended without controversy to show that his ranch was worth at least twice



the amount of the mortgage, while he had to his credit in the bank at the time of his death a balance of something over \$800; and nothing was shown to indicate that he was at the time to any extent disturbed over business affairs. He was between forty-seven and forty-eight years of age, a large, [20] strong, robust man, in good health, and of uniformly cheerful disposition; lived very happily with his wife and family, consisting of a number of children—"an ideal family life," as testified by the minister of his church,—attended church frequently and a fraternal organization of which he was a member. The evidence disclosed that he had returned only two days before his death from a visit with his wife and other members of his family to the opening of the Panama-Pacific Exposition in San Francisco, where he had enjoyed himself and appeared very cheerful and happy throughout the trip. He had been in his bank the day before his death, and the President testified that he appeared perfectly normal in manner, while on the morning of his death he was up and about the house as usual with his family, dressed the baby, helped his wife in the kitchen, and was in his usual cheerful mood at the breakfast table; and a friend who met and talked with him for several minutes on the street when he was on his way to the scene of his death testified that he had never appeared more cheerful and contented. It appeared, moreover, that he did not seek or apply for the insurance involved, it having been taken out at the solicitation of an agent of the defendant; and there is no suggestion that at the time the policy was issued, or at any other time,

the idea of self-destruction was even remotely entertained. So much on the question of motive.

The body of the deceased was first discovered by one Lalonde, a sheep shearer temporarily stopping at the time in Sparks. He testified in substance that he was walking on the railroad track and saw deceased lying in the cut and heard him breathing heavily; that thinking there was something wrong he called to two other men whom he saw in the vicinity and they all went down to where deceased was lying, or within a few feet of where he lay, saw the pistol near the body, and concluded that he had shot himself, went to a nearby point and telephoned to the sheriff, and when they returned to the place where the body lay life was extinct. These three men, Lalonde, Brown and Rodolph, afterwards testified at the inquest as to the fact of finding the body, but they had disappeared before the trial and could not be found or produced, and their testimony as taken before the coroner was read by consent. No definite effort, so far as appears, was made at the inquest to identify [21] these men as to their permanent place of abode, their character, antecedents, or mode of life, nor as to how they came to be in the vicinity at the time. They testified that they were out walking and just happened to meet there. One of them testified that they heard no report of a gun.

The evidence tended to show that the ground where the body lay was sandy and damp, and of a character to clearly show the impression of footprints, and there were certain footprints testified to by the officers as having been found about the body. They dif-

ferred somewhat, however, as to the result of their observations in this regard. The coroner testified that "the only tracks were footprints of one person that led to where the body lay"; that he saw no others. The sheriff testified: "Arriving at the scene I found three tracks leading down to where the body was lying; one track leading to the spot, and two other tracks leading to within eight or ten feet of the spot. Those tracks turned and went back, making altogether five lines of tracks, three going and two returning. . . . I saw no tracks other than what I have mentioned." The undertaker who accompanied the officers, stated: "I observed a few tracks coming from the east toward the body. I didn't take much interest in that; I was interested in other matters." No effort was made to identify the tracks or footprints testified to as leading up to the body as those of the deceased, nor was it clearly shown whether those particular tracks stopped at the point where the body lay or were retraced; moreover, the inquiry as to the character of the soil and evidence of tracks was directed generally to "the ground where the body lay," and the fact was not developed whether the condition of the wagon road running through the cut was such that footprints of one walking in the roadway could be readily discerned or followed.

Ex-sheriff Burke, Superintendent of State Police at the time of the death, an experienced officer, testified to making an examination of the place where the body was found, and its immediate surroundings on Sunday, the day after the death, for any indications

of other persons having been in the vicinity; and he stated that at a point about 100 to 125 feet from where the body lay, just across the railroad track, he found tracks in the soft, sandy ground “and observed a place where someone had been lying down.” [22]

There was a discrepancy in the evidence as to the condition of the pistol found by the body of the deceased and the number of unexploded shells it then contained. The shopkeeper who sold the weapon to deceased testified that when deceased bought the pistol he asked him how it worked and to load it; that he informed him that he had but nine cartridges on hand, while the weapon carried more, but deceased said that would be enough, and they were inserted in the magazine before he took the weapon away. There was produced in evidence at the trial the pistol with eight unexploded cartridges and one empty shell, and the sheriff testified in substance that when he picked the weapon up from the ground the hammer was back—that is, the gun in a position to shoot by pulling the trigger—with a shell in the chamber, the others in the magazine, and one empty shell lying on the ground; that he removed the magazine and the shell from the chamber, picked up the shell on the ground, and turned them over, with the weapon, to the coroner, from whose custody they were produced. It was developed on his cross-examination that his testimony at the inquest, as reported in the certified transcript of the proceedings, differed from this in one or two significant respects. It there appeared that when he was there being examined about the



condition and contents of the pistol when picked up, these questions were put and answered: "Q. Is this in the same condition that it was? A. No; I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger; I took the shell out of the chamber, and there are nine in the magazine." And it was shown in this connection that with the "safety on the trigger" the hammer could not be drawn back or cocked or the weapon exploded; that in that condition the weapon was harmless.

As suggested, the autopsy was not carried to a point sufficient to disclose the character of the missile making the wound, if missile it was. The surgeon conducting it, as indicated from his evidence, assuming apparently that the wound was the result of a gunshot and was sufficient to cause death, made no further or more definite examination as to the producing cause of the wound in the throat; the scalp was turned down sufficiently to disclose the nature of the fracture of the skull, but the brain cavity was not opened, nor, so far as appears, was a probe used to search for a bullet, the operator [23] contenting himself with inserting his finger in the opening in the throat. Accordingly the evidence did not disclose whether there was a bullet in the brain, or, if there was, that it was of the same caliber as the empty shell found by the body. Moreover, there was apparently no effort made to ascertain whether the pistol, when picked up, bore

any evidence of having recently been discharged, such as burnt powder or otherwise.

One other circumstance remains to be noticed to which much significance is attached by the plaintiff. When the body of the deceased was brought home from the coroner's there was observed by members of the family on the forehead over the right eye, just at the line of the hair and partly covered by it, evidence of an injury variously referred to by the witnesses as "a dent," "a depression," or "a scar," which the evidence tended to show had never before been observed by the members of deceased's immediate family or others acquainted with him, including his family physician, who had attended the family for 11 years. It was described by the different witnesses as being all the way from an inch and a quarter to two or more inches in length, and three-sixteenths to a quarter of an inch deep—of sufficient depth and length, as one or two expressed it, to partly lay the little finger in it—but with little, if any, discoloration; it was first observed by the undertaker at his undertaking rooms, who said he thought it was a scar and paid no particular attention to it, but he testified that it was not caused by moving the body or handling it after death. The family physician characterized it as a bruise or scar, apparently made with a blunt instrument, which it had taken considerable force to produce—sufficient to knock a man down and perhaps render him unconscious—but as to how recently it had been inflicted, he stated it was impossible definitely to say, for the reason that such a wound, if inflicted

when death shortly ensues, does not take on the same appearance or characteristics as under other circumstances; that the blood, being stopped in its circulation, has not the same tendency to extravasate or cause discoloration, as on a living person, and particularly in an injury to the scalp where the capillaries are not profuse. There was no evidence tending more definitely to disclose when or how this injury was inflicted upon the deceased. [24]

These are, in their material substance, the circumstances bearing upon the manner in which the deceased came to his death. Can it be justly said that, when considered as a whole, they point so inevitably and certainly to the conclusion of self-destruction that the jury as reasonable men were not justified in adopting a contrary view; and that their finding is so lacking in substantial support in the evidence that it is now the duty of the Court to set aside? With a full appreciation of the responsibility, so strongly impressed by counsel as resting upon the Court, to supervise their verdict, and see, so far as lies within the proper exercise of its power, that it speaks the truth, I feel constrained to answer the inquiry in the negative.

Before discussing the facts, it will be well to have in mind the principles which must control in their consideration.

Primarily, the presumption is against self-destruction, and it is one of the strongest presumptions with which courts have to deal; being, as it is, entirely opposed to natural instinct to deliberately take one's own life, the fact will never be inferred

unless the evidence is such as to fairly exclude every other reasonable hypothesis as to the cause of death. Of course, the presumption will not prevail against clear and definite proof; but if the circumstances are consistent with any other reasonable theory the latter must be adopted to the exclusion of that of suicide. These principles have become axiomatic in their application. Elliott on Evidence, sec. 2393-2394. The rule is thus stated by that learned author in the last section:

“No general or definite rule can be stated as to the extent or degree of proof considered sufficient to establish the theory of suicide. It is evident that it must be sufficient to overcome the presumption against the voluntary taking of one’s own life. And if the circumstances proved to establish the theory of suicide leave a reasonable hypothesis that death resulted in any other manner the evidence will be regarded as insufficient. A general rule might be formulated to the effect that the preponderance required of the insurer in order to overcome the proof and presumptions against suicide must be such as to exclude with reasonable certainty any hypothesis of death by accident or by the act of another.”

And as illustrating the strength of the presumption the author states in section 2392:

“The presumption of law is always against suicide; this presumption is so strong that the courts usually require some evidence of an in-



tention of suicide, as the intent is regarded as the gist of the act. This presumption [25] against suicide is also strong enough to rebut the usual and natural inferences that might arise from conditions and circumstances ordinarily pointing to suicide. Thus where the assured was found dead, lying on his back with a pistol in his right hand which was lying across his breast, and there was a pistol or gunshot wound in his right temple, this was held insufficient evidence of suicide."

As graphically stated by the Supreme Court of Kentucky in the leading case of *Aetna Life Insurance Company vs. Milward*, 118 Kentucky 716, 4 Am. & Eng. Ann. Cases, 1092, discussing the reasons underlying the presumption:

"The love of life is instinctive; self-preservation is its first, as it is its strongest law. In the absence of mental derangement, of any known fact calculated to unseat the judgment and to overcome the love of life, the inquiring mind naturally and properly looks for other causes of the deed when death by violence occurs. When all the facts are inconsistent with the theory of suicide, except simply that of the dead body in the presence of its instrument, it would be unnatural and illogical to confine the inquiry to that incident, and declare the death suicide. The act of suicide is not only unnatural, but is highly immoral and criminal. The presumption of law is against it; so is the presumption of fact."

It is true that the presumption is likewise against murder, or the intentional taking of the life of another. Accordingly, if the evidence be such as to warrant the inference either of suicide, murder or accident, the presumption must always be in favor of the latter (*Starr vs. Insurance Company*, 83 Pac. 113; 4 L. R. A. 636); whereas, if the circumstances exclude the theory of accident, but are consonant with either murder or suicide, the question must be left to the jury to determine as between those two conflicting causes. *Aetna Life Ins. Co. vs. Milward*, *supra*.

Examining the circumstances with these principles in view, I think it will readily be seen that the case is not one where the court would either have been warranted in granting an instructed verdict or be justified in setting at naught the finding of the jury.

The three facts most strongly dwelt upon by defendant in support of the theory of suicide are, naturally, the character of the death wound, the purchase of the pistol by deceased so immediately preceding death, and the finding of the weapon in close proximity to the body. As indicated above, these circumstances, picked out of the whole body of the facts and isolated from their associated surroundings, undoubtedly tend to lead the mind, as matter of first impression, to the inference of self-destruction; but it will be found that when considered in the light of precedent they are not even, taken by themselves, to be regarded as of a significance so unerring as to necessarily negative the

theory of death occurring in some other manner. [26] Many cases may be cited based upon circumstances of very similar import and pointing to suicide with a degree of apparent certainty substantially as strong, and in some aspects perhaps even stronger, where the courts have refused to hold that the jury were not justified in finding against the theory of self-destruction.

Thus, in *Aetna Life Insurance Company vs. Milward*, *supra*, the following facts, as stated by the Court, were presented, which, it will be observed, present a case as strikingly significant of suicide in many of its features as the present:

“The insured was found dead from the effects of a pistol shot wound in the head. His body, partially disrobed as he had slept, was discovered lying in a small porch or entry, which was partly enclosed, at the rear of his residence. By his side were two pistols, both loaded, but in one a discharged cartridge. The shot entered his head on the left side, behind the ear, and passed through in nearly a straight line. The two pistols were lying rather to his right side. He was right-handed. His domestic relations were apparently pleasant, being happily married. He had also two young children. His health was good. His mercantile business was prospering satisfactorily. He was about thirty-four years old, and a man of good habits and character. The shot which killed him was fired about dawn November 21st, 1900. It was heard by but one person, who testifies in the

record. The tragedy was unseen by any witness in the case. Appellee, widow of deceased, and her two infants slept in an upstairs room, but were not aroused by the shot. There was no other evidence of violence, nor of the presence of another person at the scene of the killing. The backyard, where it occurred, had walks leading to it which were paved, and would not for that reason have shown tracks. One of the pistols probably belonged to deceased, or had recently been in his possession. It was a nickle-plated Iver-Johnson revolver. The other, a blued steel barrel pistol, was not identified as to its ownership. It was from the latter the fatal shot was fired. There was some evidence that the insured was a man of intense application to business, was of a nervous temperament; that he had a year or so previous to his death consulted a physician, who had advised him to take a rest on account of nervous exhaustion or depression, and that he took a vacation of two or three weeks in the northwest. After his return the physician found him restored to health and quit treating him. A few days before his death deceased complained of pain in the back of his head."

Discussing these facts, the Court says:

"Appellant argues that the verdict is flagrantly against the evidence, because it is contended, the evidence, of which the foregoing is a fair epitome, shows clearly that the death was suicide; or, in any other view of it, fails to show



that the death was caused by accidental means, and therefore there was a failure of proof on behalf of the plaintiff. As indicated, the evidence is wholly circumstantial. It may none the less point as unerringly to a correct conclusion as if detailed by eye-witnesses. . . . Circumstantial evidence tells the story of a past transaction by the similitude between the things shown to have been done and what in the experience of mankind has been found to be generally the cause or result of similar occurrences. From these the mind deduces the most probable cause of the occurrence in question. The result of this process of reasoning has been found to be so unvarying as to justify its adoption as a rule of evidence. The jury were authorized to apply to the facts detailed their knowledge of human nature, and to indulge, in aid of deduction predicated upon the established facts, those presumptions which therefore the law allows.”

And it was held that, viewing the evidence in the light of these presumptions, the jury were justified in reaching the conclusion that the death [27] occurred from a cause other than suicide, and that it could not be said that in this process of reasoning the jury were required to “guess” the cause of death.

In *Kornig vs. Western Life etc. Co.*, 102 Minn. 31, 112 N. W. 1039, the facts were, in substance, these:

The deceased was a man of cheerful disposition; living happily with his family, a kind father, and devoted to his children. He had

been moderately successful in business, and immediately before his death was in possession of a considerable sum of money, amounting to several thousands of dollars. There was testimony to the effect that he had slept and lived at home, and got his meals at home, where he had all his things, including his clothing; that his wife had seen him on the day of his death and daily for some time before; but it further appeared that from the 1st day of March up to the 12th day of April, the day of his death, he had had a room rented in a house in Minneapolis. There was evidence tending to show that on the day of his death, he had had trouble with the woman of the house where he had the room, and that he had shot her; that she ran into the street for assistance and that thereupon the officers entered the premises and found deceased dead upon the floor.

As stated by the Court:

“He was lying on his left side, with his left cheek on the floor, his left arm beneath the body, the legs bent at the knees and drawn up, and the right arm so that the hand was on his leg. Loosely gripped in his hand was the revolver, the muzzle of which projected between and below his legs, so that it was visible to one standing in the doorway. In the right side of the head was a bullet wound, about an inch and a half back of the ear. The trend of the bullet was backward and downward. Two or three

cartridges remained in the revolver, which was of a 38 or a 32 caliber. Two or three empty cartridge shells had been extracted from it. Only a small amount of money and some papers were found on the person of the deceased. No one was found in the building in any wise connected with the death of the insured."

Upon these facts it was said by the Court:

"The defendant insists that the testimony demonstrates that this was a case of suicide—pure and simple. The law on this subject is well-settled. There is little controversy as to its formula and a singular unanimity in its application. . . . It is the defendant who must, when circumstantial evidence is relied on, establish such facts as preclude the hypothesis of natural, violent, or accidental death. The burden of proof does not rest on the plaintiff to establish such facts as demonstrate or justify theory of death otherwise than by the hand of the insured himself, in order that the jury may find against death by suicide. 'It is not material that there was not enough evidence to say that murder was done.' O'Rear, J. in *Aetna Life Ins. Co. vs. Milward*, 82 S. W. 364, 365, (and see cases collected at page 366), 118 Ky. 716, 68 L. R. A. 285. Moreover, where the cause of death is in doubt, there is a presumption of law against death by suicide. It is true that there is a corresponding presumption against death by crime. The result of the rule in such a case as this is, as has been well said by Cassoday,

C. J., in *Rohlof vs. Aid Association*, (Wis.) 109 N. W. 989, 991: 'Can it be said as a matter of law that the inferences or conclusions to be drawn from such facts are so clear and unambiguous that reasonable men, unaffected by bias or prejudice, would agree that the deceased intentionally shot himself?'

And it was held that the jury was justified in finding that the case was not one of suicide. In *Fidelity & Casualty Company vs. Lover*, 111 Fed. 773, the facts are sufficiently indicated in the discussion of their effect [28] by Judge Selby, writing the opinion for the Court of Appeals, sustaining the judgment for the plaintiff, where he says:

"Whether Noah committed suicide or not was a question of fact. He was found dead on his bed, only partly dressed, with his feet on the floor, with a pistol loosely grasped in his hand. There was some evidence as to the range of the ball that passed through his head, which tended, or at least was offered, to show that he did not fire the fatal shot. But if it be conceded, as the weight of the evidence seemed to show almost, if not quite, conclusively, that the deceased held the pistol that fired the shot, it is not absolutely certain that he committed suicide. No one saw the shooting, whether it was accidental or intentional is a matter of surmise. There is evidence tending to show that he was despondent and probably tired of life, and evidence tending to the contrary. There is conflict even as to the



wound and its location. The evidence is not entirely inconsistent with the theory of accidental killing. The evidence is presented in detail and at length in the record, and it would serve no useful purpose to state it. In a case very much like this one in many of its features, the Supreme Court has recently held that the trial court did not err in submitting the question of suicide to the jury. *Supreme Lodge vs. Beck*, 181 U. S. 49."

There are other interesting cases that might be referred to, but it would subserve no useful purpose to discuss them. In all of them the facts were strongly, but unsuccessfully, urged by the insurer as practically demonstrating suicide. (See also *National Union vs. Fitzpatrick*, 133 Fed. 694; *O'Connor vs. Modern Woodmen etc.*, 124 N. W. 454; *Metropolitan Life vs. De Vault*, 109 Va. 392.)

Illuminated by the reasoning of these cases, the sinister significance of the facts relied on as making in favor of suicide is greatly modified, if not largely negatived; and when they are considered, as they must be, with all the concomitant circumstances, it is impossible, with a just appreciation of the reasonable deductions to be drawn therefrom, to say that the jury were not warranted in the conclusion reached by them. The one respect in which the instant case can in an essential respect be differentiated from the facts presented in any one of those above cited is in the peculiar character and location of the injury causing death. But, in the first place,

it would be going far to say that such a wound, even if definitely shown to have been produced by deceased's pistol, could not have been the result of accident—from a careless handling or examination of the weapon—especially in view of the fact, which the evidence tends to disclose, that the deceased was unfamiliar with its working. But conceding that that theory is not sufficiently probable as the basis of a verdict, to make it reasonable, very clearly the facts do not exclude the theory of the injury having been received at the hands of another. [29]

It may readily be conceived that it could have been inflicted in a close, deadly struggle with an assailant, or after deceased had been knocked down,—the weapon being inserted in his mouth to stifle his cries for help or to deaden the sound of the explosion. And to account for the absence of any indications of a struggle where the body lay, and the condition of the clothing, it might well be that the assault was committed on the railroad track or at some other point where evidence of a struggle would not be left, and the body carried to the cut and there disposed as found for the very purpose of indicating suicide. The jury may well have reasoned in this way, and it would not, as contended, involve a resort to surmise or speculation, but merely legitimate deduction from the circumstances.

Aetna Life Ins. Co. vs. Milward, *supra*.

So far as the purchase of the pistol is concerned, it is not of controlling significance. It may have been dictated from any one of many considerations in no wise connected with the purpose of deceased

to take his own life. He may have been aware that he was going on a dangerous errand and might need it for protection. And as to the finding of the weapon by the body, that is a feature characterizing so many cases of death by violence as to carry necessarily little weight. As said by the court in *Kornig vs. Western Life etc., Co.*, *supra*, in discussing the circumstance of a revolver found loosely gripped in the right hand of the deceased:

“In the nature of things this circumstance is by no means conclusive. Nothing is more common in the history of crime than to place the means of death near or in the hands of the victim. The revolver was not shown to have belonged to the deceased, nor to have been formerly in his possession. In many reported cases in which the insurance companies have sought to avoid liability on the theory of suicide, the presence of a pistol, in connection with other circumstances, has been held by the courts not to sustain the defense. The fact that a pistol was found in the hand of deceased is not conclusive. In *Leman vs. Manhattan Life Insurance Company*, 15 So. 388, 46 La. Ann. 1189, 24 L. R. A. 589, 49 Am. St. Rep. 348, a man without physical or mental disturbance or financial or family trouble and in good spirits was found dead, with a pistol wedged in the bed of his thumb. The verdict for the beneficiary was sustained. In *Travelers' Insurance Company vs. Nitterhouse*, 38 N. E. 1110, 11 Ind. App. 155, the beneficiary recovered, although the deceased

was found with a bullet hole near the center of his forehead, and with a self-cocking revolver in his right hand—the last three fingers resting on the handle, the index finger on the trigger, and the thumb just back of the hammer. In very many other cases beneficiaries recovered, notwithstanding the presence of the revolver in the immediate vicinity of the deceased.” [30]

Another circumstance should not be overlooked; the pistol found lying by the deceased was a modern, high-power weapon, carrying, as the evidence discloses, steel-jacketed cartridges of great penetrating force, and yet, as we have seen, the projectile fired into deceased's brain, if such was the cause of the wound, made no exit. There are other considerations of a minor character arising upon the evidence tending in a greater or less degree to negative the theory of suicide; such, for instance, as to how, as the body lay, blood could have gotten on the elbow of his coat. They need not be all here adverted to, since it is not now so material how, in fact, the deceased came to his death, as it is that the evidence be shown to involve some reasonable theory of death other than self-destruction; and it would seem that what has been suggested, when taken in conjunction with the very potent although negative circumstance that there is an entire absence of anything in the evidence tending to disclose motive, establishes such a case. The absence of motive, as in a crime, while in no wise conclusive, is, notwithstanding, a consideration which enters strongly into the sum of



the evidence to be considered, in an effort to establish suicide from circumstances.

Thus, in *Modern Woodmen vs. Kozak*, 63 Neb. 146, 88 N. W. 248, discussing the absence of motive, it is said:

“But there is another fact of which the jury could not have been ignorant, namely, the absence of all evidence in the record tending to show a motive inciting to self-destruction. Self-murder is abhorrent to the mind, and common observation teaches that normal men are not driven to the desperation of suicide without some exciting cause of more than ordinary magnitude.”

And see note to *Modern Woodmen etc. vs. Kinche-loe* (175 Ind. 563), 28 Am. & Eng. Ann. Cases, 1259, 1262.

As a result, and after a more than usually painstaking consideration of the record in this case, I am satisfied that there was that in the circumstances presented to the jury to fully warrant the verdict rendered; and that to set their verdict aside would, in effect, be to deny the plaintiff her constitutional right to have the jury pass upon the facts.

This conclusion renders it unnecessary to consider the plaintiff's motion to dismiss the petition for want of due service.

A new trial will be denied. [31]

[Indorsed.] [32]

**Order Staying Execution.**

Minutes of Court, of Date March 10th, 1916.

[Title of Cause.]

\* \* \* On motion of counsel for defendant, it is ordered that execution herein be stayed 42 days, upon the filing of a bond in the sum of ten thousand dollars; and that defendant have 42 days within which to take such further steps herein as advised.  
[33]

---

[Title of Court and Cause.]

**Order Staying Execution and Extending Time for Filing Petition or Motion for New Trial and for Bill of Exceptions.**

Upon application of the above-named defendant, New York Life Insurance Company, a corporation, and good cause appearing therefor, and by consent of plaintiff's attorney, execution upon the judgment entered herein on the 10th day of March, 1916, is hereby stayed for a period of forty-two (42) days from the date of the entry of the judgment herein, upon defendant filing herein and within forty (40) days from the date of the entry of the judgment herein, a bond, subject to the approval of the Court or the Judge thereof, who tried the above-entitled action, properly conditioned with sufficient sureties or surety in the penal sum of \$10,000, in order to give the defendant, and defendant hereby is given, additional time, to wit, forty-two (42) days from the date of the entry of the judgment herein, to file in

the Clerk's office of the above-entitled court its petition or motion for a new trial.

It is further ordered that jurisdiction be and is hereby retained of and over the above-entitled case by said court over and beyond the February term, 1916, in order to enable and permit said defendant to file, and said defendant is hereby given additional time, to wit, twenty (20) days after decision or determination of defendant's said petition or motion for a new trial, within which to prepare, serve, present, have settled and authenticated and to file its bill of exceptions by it reserved; and that defendant's petition or motion for new trial, if filed, and that its bill of exceptions may be presented and allowed, authenticated, served, filed and determined after the expiration of the February Term, 1916, of said court, [34] and for those purposes jurisdiction of this case is hereby retained. This order to be effective only on service on opposite party and filing original in clerk's office.

Dated this 17th day of March, 1916.

WM. C. VAN FLEET,  
District Judge.

[Indorsed.] [35]

---

[Title of Court and Cause.]

**Notice of Motion and Petition for New Trial.**

To the Above-named Plaintiff, Matilda C. Neasham,  
and to Thos. E. Kepner, Attorney for Plaintiff:

Please take notice that the above-named defendant, New York Life Insurance Company, a corpora-

tion, intends to move in the above-entitled court for an order,—

That the verdict of the jury, rendered herein, and the judgment, entered thereon, each be vacated and set aside, and a new trial awarded or granted to the defendant herein upon the grounds generally that the trial court erred in stating the law; that the verdict of the jury has no evidence to support it; or is against the weight of and contrary to the evidence; that the great preponderance of the evidence is against the verdict; that the verdict is due to passion, prejudice or partisan feeling, and upon and for the grounds stated in the petition or motion for new trial, a copy of which said petition or motion for new trial is served herewith.

That said motion will be made upon this notice of motion and petition for new trial, and said petition or motion for new trial, and the minutes of the Court, and upon all the pleadings and proceedings on file in the clerk's office.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendant.

Dated Reno, Nevada, April 15, 1916. [37]

---

[Title of Court and Cause.]

**Petition or Motion for New Trial.**

Comes now the above-named defendant, New York Life Insurance Company, a corporation, and petitions or moves: That the verdict of the jury, rendered herein, and the judgment, entered thereon, each be vacated and set aside, and a new trial awarded or



granted to the defendant herein, for the following reasons:

1. That the Court erred in refusing to grant, and in overruling and denying, defendant's motion, made at the conclusion of all the evidence offered by the plaintiff, to direct a verdict, and to instruct the jury to return a verdict, for the defendant upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of \$10,000 as the amount of insurance under said contract, Exhibit "A" to the complaint herein.

2. That the Court erred in ruling and holding, under the pleadings, the opening statement of plaintiff's attorney and plaintiff's proof in chief, that the burden of proof was upon the defendant to establish self-destruction of the insured, William C. Neasham.

3. That the Court erred in allowing, over objection and exception by defendant, A. A. Burke, a witness for plaintiff, to testify that, on the day after the body of insured, William C. Neasham, had been discovered and removed, the witness discovered tracks at and near the place where the body of insured, William C. Neasham, was discovered.

4 That the Court erred in refusing to grant, and in overruling and denying, defendant's motion, made at the conclusion of all the evidence offered by both parties in the case, to direct the verdict and to instruct the jury to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of \$10,000, as the amount of the insurance under said

contract, Exhibit "A" [38] to the complaint filed herein.

5. That the Court erred in refusing to charge the jury as requested in defendant's requested instruction No. 1, which reads as follows:

The jury are instructed that under the evidence in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of Ten Thousand Dollars as the amount of the insurance under said contract, Exhibit "A" to the complaint herein. You are therefore instructed to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover a judgment of Ten Thousand Dollars as to the amount of the insurance under said contract, Exhibit "A" to the complaint herein.

6. That the Court erred in refusing to charge the jury as requested in defendant's requested instruction No. 2, which reads as follows:

The jury are instructed that under the facts in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, and you are instructed to return a verdict for the defendant.

7. That the Court erred in refusing to submit to the jury the two questions of fact as requested in writing by defendant at the close of all the evidence and before the argument and before the charge to the

jury, said questions of fact so requested to be submitted to the jury, reading as follows:

a. That the insured, William C. Neasham, came to his death from a gunshot wound self-inflicted.

b. That the insured, William C. Neasham, came to his death from a gunshot wound inflicted by some person or persons other than himself.

8. That the Court erred in all, each and every part of its charge to the jury, wherein and whereby the jury was instructed,—

a. That plaintiff has made a *prima facie* case; that self-destruction, in this case, is an affirmative defense, and that the burden is upon the defendant to establish, by a preponderance of the evidence, self-destruction.

b. That self-destruction or suicide means the same thing in this case.

c. That “The term ‘self-destruction’ used in this policy and understood in the law, does not necessarily cover and include every instance in which a man dies as a result of his own act. The term means, and is intended to mean, and is meant to express the instance where the act which produces death is done intentionally, and with the deliberate purpose of producing death. In other words, self-destruction contemplates a union [39] or joint operation of act and intent. It is the intent with which the act is done which distinguishes it from death resulting from accident or negligence. If one is handling a deadly weapon or other instrumentality, in a negligent and careless manner, and as a result is accidentally killed, in such an instance, although death results

from his own act, it is not self-destruction or suicide such as to excuse a defendant's liability, for the intent is absent. In such a case it is what is denominated an accidental death. Whereas, if the same act be done intentionally, with the purpose of taking his life, it is self-destruction in the sense in which that term is used in the policy."

d. That "if the jury find that the act of shooting was done by the deceased, that it was done intentionally, and with the purpose of taking his own life, then, as I have said, whether he was at the time sane or insane, the plaintiff cannot recover. If, on the other hand, the jury find that the shooting was done by the deceased, but that it was done accidentally, or was the result of carelessness, and without the intent or purpose of taking his own life, then under the evidence, the plaintiff will be entitled to a verdict.

9. That the Court erred in so much of its charge to the jury as submitted to the jury to determine any question of fact, except that the insured, William C. Neasham, came to his death from a gunshot wound self-inflicted or inflicted by some person or persons other than himself.

10. That the Court erred in permitting the jury, after it had retired to the jury-room, to deliberate upon the verdict, to receive, have and examine in the juryroom the pistol, magazine and shells, introduced and admitted in evidence marked marked Defendant's Exhibit 1, over objection of defendant.

11. That the verdict of the jury was not sustained by sufficient evidence.

12. That there was no testimony tending to sus-



tain the verdict of the jury.

13. That the verdict of the jury was against the weight of, and contrary to, the evidence.

14. That the verdict of the jury was contrary to the law. [40]

15. Because of other errors in law occurring at the trial and excepted to by the defendant.

WHEREFORE, defendant petitions or moves that the verdict be vacated and set aside, and that a new trial be granted herein.

CHENEY, DOWNER, PRICE & HAWKINS,  
Attorneys for Defendant.

**Order Allowing Motion for New Trial, etc.**

The undersigned, the United States District Judge who presided at the trial of the above-entitled case, in the United States District Court for the District of Nevada, certifies that he hereby allows the foregoing petition or motion, that the verdict of the jury be vacated and set aside, and that a new trial be granted herein, to be filed herein.

WM. C. VAN FLEET,  
District Judge.

[Indorsed.] [41]

---

[Title of Court and Cause.]

**Order Retaining Jurisdiction.**

In the above-entitled case, it appearing that the petition or motion for new trial, heretofore filed in the above-entitled case by defendant, has not been heard or determined; and that by order of Court heretofore made and herein entered jurisdiction was

retained of and over said cause by said court over and beyond the February Term, 1916, for the purposes therein stated; and said term of said court is about to and will expire before said petition or motion for new trial can be heard and determined:

Therefore upon application of defendant, and good cause appearing therefor, it is ordered that jurisdiction be and is hereby retained of and over the above-entitled case by said court over and beyond the May Term, 1916, in order that said petition or motion for a new trial may be heard and determined and to enable and permit said defendant to have settled and to file its Bill of Exceptions by it reserved within the time and in the manner as specified in an order of Court heretofore made and entered herein, and to take such steps as it may be advised concerning the filing of a petition for and suing out a writ of error; and for the purpose of hearing and determining said petition or motion for a new trial, settling, allowing, serving and filing a bill of exceptions, filing a petition for and suing out a writ of error, jurisdiction of this case is retained over and beyond the May Term, 1916.

Dated this 26th day of September, 1916.

WM. C. VAN FLEET,  
District Judge.

[Indorsed.] [42]

---

[Title of Court and Cause.]

**Order Denying Petition for a New Trial.**

Defendant's petition for a new trial herein having been heretofore submitted, and the same having been

duly considered, now, in accordance with the conclusion reached in the opinion this day filed:

It is ordered that said petition be, and the same is hereby denied.

Dated: July 16th, 1917.

WM. C. VAN FLEET,  
District Judge.

[Indorsed.] [45]

---

[Title of Court and Cause.]

**Assignment of Error.**

Comes now the above named, New York Life Insurance Company, a corporation, plaintiff in error in the above numbered and entitled cause, and in connection with its petition for writ of error in this case assigns the following errors which plaintiff avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

I. That the Court erred in overruling the demurrer to the complaint filed in this cause.

II. That the Court erred in overruling the motion interposed by the defendant at the close of plaintiff's evidence for a nonsuit and to direct a verdict upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of \$10,000.00 as the amount of the insurance under said contract, Exhibit "A" to the complaint herein, for the following reasons:

1. That the cause of action asserted in plaintiff's complaint is founded and based upon a written con-

tract, Exhibit "A," attached to and made a part of the complaint.

2. That it appears from the face of the complaint:

a. That "In event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more."

b. That the first insurance year under said contract, Exhibit "A" to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

c. That the insured, William C. Neasham, during said first insurance year, and on, to wit, the 27th day of February, 1915, died.

d. That by the terms of said contract, Exhibit "A" to the complaint, the [46] amount of the insurance thereunder is fixed and determined by the facts applicable thereto as therein stated, and the amount plaintiff would be entitled to receive, as the amount of insurance under said contract, upon the death of the insured, depends upon the fact—did or did not the insured, William C. Neasham, destroy or kill himself.

e. That said insured, William C. Neasham, may have killed or destroyed himself, in which event the insurance under said contract Exhibit "A" to the complaint, was not \$10,000, but was the sum of \$456.90 and no more.

3. That plaintiff's pleadings and proof establish, among other things, the following facts, to wit: That the insured, William C. Neasham, came to his death



from a gunshot wound ; that said gunshot wound was of the head and brain and that death was instantaneous.

4. That to entitle the plaintiff to recover said sum of \$10,000 as the amount of the insurance under said contract, Exhibit "A" to the complaint, it must be made to appear as a fact that the insured, William C. Neasham, is dead and that his death was from some cause by reason of which, under the express terms of said contract, plaintiff is entitled to receive the said \$10,000; that while it is admitted in the pleadings and established by plaintiff's proof that the insured, William C. Neasham, came to his death from a gunshot wound, there is no proof of any fact from which it can be determined that said insured, William C. Neasham, did not destroy or kill himself.

5. That plaintiff has failed to establish the material fact, alleged in paragraph IV of the complaint and denied in paragraph 3 of the amended answer, that plaintiff furnished defendant with due proof of the death of the insured, William C. Neasham.

That the proofs of death furnished in evidence by plaintiff do not constitute due proof of death as is required by the contract, Exhibit "A" to the complaint, in that it appears from said proofs of death that the insured came to his death from a gunshot wound of head and brain, and that death was instantaneous; but it does not appear therefrom whether the insured did or did not destroy himself; and inasmuch as defendant's obligation, under the contract, Exhibit "A" to the complaint, in case of self-destruction during the [47] first insurance

year, was for a sum equal to the premiums thereon paid to and received by the Company and no more, and that the premium was not \$10,000 and does not exceed \$456.90, the extent of defendant's obligation could not be determined from the proofs of death, in evidence as the proofs of death, furnished by plaintiff to defendant Company.

6. That plaintiff has failed upon the trial to prove a sufficient case for the court or jury—in so far as plaintiff seeks to recover a judgment in the sum of \$10,000, as the amount of the insurance, said amount being one of the sums specified in said contract, Exhibit "A" to the complaint, to be paid to plaintiff, as the amount of the insurance, upon the establishment of certain facts; but the facts essential to plaintiff's right to recover said sum of \$10,000 under said contract, Exhibit "A" to the complaint, as the amount of the insurance, have not been established by plaintiff's evidence.

III. That the Court erred in ruling and holding, under the pleadings, the opening statement of plaintiff's attorney and plaintiff's proof in chief, that the burden of proof was upon the defendant to establish self-destruction of the insured, William C. Neasham, for the following, as well as other, reasons.

This action is upon a contract, Exhibit "A" to the complaint, in the contract it is provided, *inter alia*,—

“Self-destruction. In event of self-destruction during the first insurance, year whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums

thereon which have been paid to and received by the Company, and no more.”

This action being upon a contract conditioned, under certain conditions to pay one sum and under other certain conditions to pay a different sum, upon the death of the insured according to the facts concerning the death; plaintiff was required, therefore, to allege facts, which, if true, would enable her to recover the amount sought; death occurring within the first insurance year, it was essential to the condition precedent to the plaintiff's right to recover the full amount of the policy that she allege and prove facts authorizing a judgment for the full amount of the policy; in order to recover the \$10,000 it was necessary for plaintiff to allege and show by a fair preponderance of the evidence facts enabling her to prove the allegations of her complaint and entitling her to the judgment; no such allegations [48] appear in the complaint and no proof of such facts was made by the plaintiff.

IV. That the Court erred in sustaining objections of the plaintiff to the questions propounded to Dr. Gibson, a witness for defendant, as appears at pp. 110, 111 and 114, bill of exceptions, to wit:

“Q. Can you state the difference between gunshot wound, or a pistol shot wound, made by the pistol being fired close to the object that it strikes, and when it is some distance from the object?”

“Q. If a pistol shot was fired with the pistol close to the anatomy of a human person, right

up close to it, would there be any difference between the character of the wound thus made and the character of a wound received by a bullet from the same pistol fired at some distance from that object?"

"Q. Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by some one else?"

"Q. What is your opinion as to whether the wound was inflicted by William C. Neasham himself, or by another?"

V. That the Court erred in sustaining objections of plaintiff to the questions propounded to Dr. Morrison, a witness for defendant, as appears at pp. 119, 121, bill of exceptions, to wit:

"Q. Assuming that testimony to be true, state whether or not in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?"

"Q. Assuming the testimony of Dr. Gibson as true—I will ask this question, your Honor, to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?"

To all of the questions above mentioned, the Court sustained objections and refused to allow the questions to be answered, to which ruling exceptions were taken as appears from the record.



VI. The Court erred in admitting, over objection interposed by defendant, testimony of the witness Burke as to what he saw on the ground February 28th, the day after the insured was discovered dead or dying, as appears in the bill of exceptions p. 142, 143. At p. 143 said witness was permitted to testify, over objection of defendant,—

“A. I observed tracks in the ground there; the ground was a soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down.”

It appearing from the witness' testimony that the place mentioned was 100 to 125 feet distant from the place where the body was discovered and it was not shown or attempted to be shown that the place was in the same condition that it was on the day insured came to his death.

VII. That the Court erred in permitting plaintiff, over defendant's objection, to offer in evidence what purported to be a portion of the testimony [49] of witness Farrel, before the coroner, as shown by bill of exceptions, pp. 157, 158, said evidence being, as appears from the record, a portion of purported testimony of witness Farrel given In the Matter of the Inquisition upon the Body of William C. Neasham, Deceased, said witness having previously testified, as appears in the record, Bill of Exceptions, pp. 82, 83, that he did not give the testimony attributed to him in the record “In the Matter

of the Inquisition upon the Body of William C. Neasham, Deceased.” There is no statute providing that such testimony taken before a coroner shall be evidence in any proceeding of any nature or kind whatsoever. The testimony so admitted over objection being,—

“Mr. KEPNER.—I read the portion of the testimony of Charles Farrell appearing on page 7 of the transcript, beginning with line 15. (Reads:) ‘Q. By Mr. Lundsford: Did you take the gun? A. Yes, sir, I picked the gun up. Q. It is here now? A. Yes, sir. This is the gun. Q. Is this in the same condition as it was? A. No; I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger. I took the shell out of the chamber, and there is nine in the magazine. Q. You have the empty cartridge now. A. Yes.’

Mr. KEPNER.—That is the portion which I read to the witness, your Honor,”

VIII. That the Court erred in refusing to grant, and in overruling and denying defendant’s motion made at the conclusion of all the evidence offered by both parties in the case, to direct a verdict and to instruct the jury to return a verdict for the defendant upon the cause of action asserted in plaintiff’s complaint, in so far as plaintiff seeks to recover the sum of \$10,000 as the amount of the insurance under

said contract, Exhibit "A" to the complaint, for the following reasons,—

1. That under the pleadings and evidence in this cause, and the law applicable thereto, there is no liability as against the defendant for, and the defendant is not indebted to the plaintiff in said sum of \$10,000.

2. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit "A," attached to and made a part of the complaint.

3. That it appears from the record in the cause:

a. That "In event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more."

[50]

b. That the first insurance year under said contract, Exhibit "A" to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

c. That said insured, William C. Neasham, during said first insurance year, and on, to wit February 27, 1915, committed self-destruction by a gunshot wound self-inflicted.

4. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insurance was not \$10,000, and, under the terms of said contract, Exhibit "A" to the complaint, the plaintiff is not entitled to recover said sum of

\$10,000, or any other sum or amount greater than a sum equal to the premiums, on said contract or policy, Exhibit "A" to the complaint, which have been paid to and received by the company; and appears from the record herein, and is admitted that the premium on said contract or policy, Exhibit "A" to the complaint, was the sum of \$456.90 and no more.

IX. That the Court erred in refusing to charge the jury as requested in defendant's requested instruction No. 1, which reads as follows:

"The jury are instructed that under the evidence in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of Ten Thousand Dollars as the amount of the insurance under said contract, Exhibit 'A' to the complaint herein. You are therefore instructed to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover a judgment of Ten Thousand Dollars as to the amount of the insurance under said contract, Exhibit 'A' to the complaint herein." Bill of Exceptions, p. 191."

X. That the Court erred in refusing to charge the jury as requested in defendant's requested instruction No. 2, which reads as follows:

"The jury are instructed that under the facts in this case and the law applicable thereto, there is no liability against the defendant, New York



Life Insurance Company, and you are instructed to return a verdict for the defendant.”

XI. That the Court erred in all, each and every part of its charge to the jury, wherein and whereby the jury was instructed,—

a. That plaintiff had made a *prima facie* case; that if the insured died from any other cause than self-destruction, plaintiff must recover; that the defense of self-destruction or suicide, which for the present purposes means the same thing, is an affirmative defense and the burden is upon the defendant [51] to establish, by a preponderance of the evidence, with reasonable certainty that the death was the result of self-destruction, rather than accident or mischance. The text of the charge to which these assignments apply reads as follows:

“The evidence shows without conflict, and in fact it is admitted, that the death of the insured occurred during the first year of the existence of the policy; and the main issue, therefore, which I have referred to is as to the manner of that death, since, under the evidence in the case, the plaintiff has made out her cause of action entitling her to recover the stipulated amount of insurance, unless that right is found by you to have been defeated by the act of the deceased in taking his own life.

“If the insured died from any other cause than self-destruction, plaintiff must recover. If he took his own life, whether sane or insane, the verdict must be for the defendant.

“The defense of self-destruction or suicide, which for present purposes means the same thing, is an affirmative defense, and the burden of proving it rests upon the defendant who asserts it. Suicide or self-destruction, being at variance with the ordinary human instincts, and involving a wrongful act, is never to be presumed, but must be proved or established by evidence sufficiently satisfactory to overcome the presumption against it, and to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of the death of the person involved other than that of self-destruction. The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to overcome the presumption of the innocence of the deceased of the wrong involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, rather than accident, mischance, or violent injury inflicted at the hands of another.”

b. “The term ‘self-destruction’ used in this policy and understood in the law, does not necessarily cover and include every instance in which a man dies as a result of his own act. The term means, and is intended to mean, and is meant to express the instance where the act which produces death is done intentionally, and with the deliberate purpose of producing death. In other words, self-destruction contemplates a

union or joint operation of act and intent. It is the intent with which the act is done which distinguishes it from death resulting from accident or negligence. If one is handling a deadly weapon or other instrumentality, in a negligent and careless manner, and as a result is accidentally killed, in such an instance, although death results from his own act, it is not self-destruction or suicide such as to excuse a defendant's liability, for the intent is absent. In such a case it is what is denominated an accidental death. Whereas, if the same act be done intentionally, with the purpose of taking his life, it is self-destruction in the sense in which that term is used in the policy. While the person whose act is concerned must be conscious of the fact that the act he does is dangerous and may produce death, it is not necessary under such a provision as that involved here, in order to relieve the insurer, that the person taking his life be conscious of the mortal quality or consequence of his act, but only that he knows that the means he employs will cause, or is calculated to cause death or danger to his life." pp. 194-195.

c. "If, on the other hand, the jury finds that the shooting was done by the deceased, but that it was done accidentally, or was the result of carelessness, and without the intent or purpose of taking his life, then under the evidence, the plaintiff will be entitled to a verdict."

d. "All I intend by this suggestion to you is, that if in your examination of this evidence you conclude you cannot account for the death of the deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with some other theory, which you believe [52] the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment."

e. "The COURT.—Well, that is covered by the charge of the Court, when it instructs the jury that the evidence must enable them to find that the death was the result of self-destruction, or of course the plaintiff would be entitled to recover.

"The burden, gentlemen of the jury, being upon the defendant to establish its affirmative defense that this death was the result of self-destruction, it follows, as I have heretofore suggested to you—perhaps counsel didn't notice it—that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, if it leaves you in doubt, then of course the defendant will not have sustained the burden of proof by a preponderance of the evidence, and your verdict will necessarily be for the plaintiff."

That the Court erred in so much of its charge to the jury, above set forth, wherein and whereby the jury was authorized to determine any question of



fact or theory concerning the death of the insured, William C. Neasham, except that the insured came to his death from a gunshot wound self-inflicted or inflicted by some person or persons other than himself.

In that it appears from plaintiff's complaint, plaintiff's reply and defendant's amended answer that the insured came to his death from a gunshot wound—the defendant alleging in its amended answer that the insured came to his death as the result of a self-inflicted gunshot wound, while plaintiff in her reply alleges that the insured “came to his death on the 27th day of February, 1915, from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff”; the issue, and only issue, of fact being whether or not the insured destroyed himself by gunshot wound as maintained by the defendant, or whether the insured came to his death from a gunshot wound inflicted upon him at the hands of some person or persons other than insured, as maintained by plaintiff; there was no issue of accident, mischance or grounds under the pleadings for the jury to speculate or theorize and the charge to the jury above set forth, permitted the jury to find for the plaintiff upon a theory of the case which was not in issue as made by the pleadings.

XII. The verdict of the jury is not sustained by the evidence:

1. The verdict of the jury, upon all the evidence, in so far as plaintiff sought to recover the sum of \$10,000 should have been in favor of defendant, for the following reasons:

A. That under the pleadings and evidence in this case, and the law [53] applicable thereto, there is no liability against the defendant company, and the defendant is not indebted to the plaintiff in the said sum of Ten Thousand Dollars.

B. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit "A" attached to and made a part of the complaint.

C. That it appears from the record in this cause:

a. That "in event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more."

b. That the first insurance year under said contract, Exhibit "A" to the complaint, was between the 10th day of July, 1914, and the 10th day of July 1915.

c. That said insured, William C. Neasham, during said first insurance year, and on, to wit, February 27th, 1915, committed self-destruction by a gunshot wound self-inflicted.

D. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insurance was not Ten Thousand Dollars, and under the terms of said contract, Exhibit "A" to the complaint, the plaintiff is not entitled to recover said sum of Ten Thousand Dollars, or any other sum or amount greater than a sum equal to the premium on said contract or policy, Exhibit "A" to the com-

plaint which has been paid to and received by the company. And it appears from the record herein, and is admitted, that the premium on said contract or policy, Exhibit "A" to the complaint, was the sum of \$456.90, and no more.

2. That the verdict of the jury, if for the plaintiff, under the evidence should have been only for the sum of \$456.90 the amount of the annual premium, but plaintiff in open court waived her right to a verdict and judgment for said sum of \$456.90.

XIII. That there was no testimony tending to sustain the verdict of the jury.

XIV. That the verdict of the jury was contrary to the law. [54]

WHEREFORE, defendant, plaintiff in error, prays that the judgment of said Court be reversed.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Plaintiff in Error.

[Indorsed.] [55]

---

[Title of Court and Cause.]

**Petition for Writ of Error.**

To the Honorable WM. C. VAN FLEET, Trial Judge  
of the Above-entitled Action in the Above-  
entitled Court:

Now comes New York Life Insurance Company, a corporation, by its attorneys, and respectfully shows: That on the 10th day of March, 1916, a jury, duly impanelled, found a verdict against your petition and in favor of Matilda C. Neasham, plaintiff

above-named, and upon said verdict a judgment was entered.

That upon said March 10, 1916, a minute order in the above-entitled action was made and entered in words as follows, to wit: "On motion of counsel for defendant, it is ordered that execution herein be stayed 42 days upon the filing of a bond in the sum of Ten Thousand Dollars; and that defendant have 42 days within which to take such further steps herein as advised"; that thereafter and on March 17, 1916, a written order staying execution and extending time for filing petition or motion for a new trial and for bill of exceptions was made, served and entered in the above-entitled action, by which said last-mentioned order execution upon the judgment was stayed for a period of forty-two days from the date of the entry of the judgment, upon defendant filing, within forty days from the date of the entry of the judgment, a bond, subject to the approval of the court or judge thereof who tried the above-entitled action, properly conditioned with sufficient sureties or surety in the penal sum of \$10,000, in order to give defendant, and defendant was thereby given, additional time, to wit, forty-two days from the date of the entry of the judgment to file in the clerk's office its petition or motion for a new trial; and it was further ordered that jurisdiction be and the same hereby is retained of and over the above-entitled case by said Court over and beyond the February Term, [56] 1916, in order to enable and permit defendant to file, and said defendant was



thereby given additional time, to wit, twenty days after decision or determination of its said petition or motion for a new trial, within which to prepare, serve, present, have settled, authenticated, and to file its bill of exceptions by it reserved; and that defendant's petition or motion for a new trial, if filed, and that its bill of exceptions may be presented, allowed, authenticated and served, filed and determined after the expiration of the February Term, 1916, of said court, and for those purposes jurisdiction of the case was thereby retained; that the defendant, within the forty-two days granted by the order, filed its petition or motion for a new trial, which was in due course admitted, and thereafter and on July 16, 1917, the court filed its opinion thereon, and an order was entered in accordance therewith, denying a new trial; that on January 16, 1917, defendant's bill of exceptions was filed and on July 21, 1917, said bill of exceptions was served upon plaintiff's attorney and thereafter and on July 23, 1917, defendant presented its bill of exceptions to the trial judge for allowance and certification, which said bill of exceptions was by the Trial Judge certified and allowed August 7, 1917; and thereafter filed; that by order made at proper times, jurisdiction has been retained over this case from term to term in order that said petition or motion for new trial may be determined and to enable and permit said defendant to have settled and to file its bill of exceptions by it reserved and to take such steps as it may be advised concerning the filing of a petition for and suing out of a writ of error; that upon the order being entered

on July 16, 1917, denying defendant a new trial, judgment in favor of plaintiff and against the defendant became final judgment.

Your petitioner, feeling itself aggrieved by the said verdict and the judgment entered thereon as aforesaid, therefore petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States in such case made and provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Circuit [57] Court for the Ninth Circuit, aforesaid, sitting at San Francisco, State of California, in said Circuit for the correction of errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of surety to be given by the plaintiff in error, conditioned as the law directs, and upon the giving of such bond as may be required, that all further proceedings may be suspended until the determination of such writ of error by the Circuit Court of Appeals.

CHENEY, DOWNER, PRICE & HAWKINS,  
Attorneys for Petitioner in Error.

Writ of Error granted this 13th day of August, 1917; and supersedeas bond fixed at \$13,500.00, and upon said bond being given by the defendant, Petitioner, New York Life Insurance Company, conditioned as the law directs, all further proceedings will be suspended until the determination of said

Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

Good cause appearing therefor, the above-named defendant, petitioner herein, is allowed five days from this date within which to give said supersedeas bond.

Dated: August 13th, 1917.

WM. C. VAN FLEET,

Judge of the United States District Court.

[Indorsed.] [58]

---

[Title of Court and Cause.]

**Proceedings Had March 6, 1916.**

This case came on regularly for trial in the above-entitled court on Monday, March 6th, 1916, at 10 o'clock A. M., before the Honorable E. S. FARRINGTON, District Judge, Mr. Thomas E. Kepner appearing as attorney for plaintiff, and Mr. Prince A. Hawkins, of Cheney, Downer, Price & Hawkins, appearing as attorney for defendant.

During the formation of the jury, the Judge stated that he was a policy holder in the defendant company, and submitted to counsel the question of his disqualification.

Thereupon counsel consented to complete the jury.

After argument of said matter, it was held that the Judge of this court was disqualified by reason of being a policy-holder in the defendant company.

The jury was accepted, but not sworn, counsel stipulating that the jury should be sworn later, providing counsel be permitted to ask them if anything

had occurred during the recess to create in their minds an opinion touching the merits of the case, or which caused any bias or prejudice for or against either party.

With the usual statutory admonition, the jury is excused, the case continued, and court adjourned until Wednesday, March 8th, 1916, at 10 o'clock A. M. [61]

Wednesday, March 8th, 1916.

Court convened—10 o'clock A. M.

Honorable W. C. VAN FLEET, Presiding.

(All parties present.)

The COURT.—I gather from what counsel has said that the twelve men in the box have been examined as to their general qualifications, and as to their state of mind to sit in this case?

Mr. KEPNER.—Yes, your Honor.

The COURT.—Is there a desire for any further examination at this time?

Mr. KEPNER.—If your Honor please, I would like to ask one or two questions as to anything that may have happened since the jurors were passed on Monday.

The COURT.—Very well.

(After further examination of the jurors on their *voir dire*, counsel for the plaintiff states he is satisfied with the jury.)

(By leave of the Court, counsel for defendant exercises a peremptory challenge to one of the jurors in the box. The jury is then completed and sworn to try the case.



Whereupon the following proceedings are had, and testimony introduced:)

The COURT.—You may proceed, gentlemen.

Mr. KEPNER.—Shall I read the pleadings?

The COURT.—You may make a statement, or take such course as you are advised. It is not absolutely essential to read the pleadings to the jury; you may state what you claim to be the plaintiff's case.

Mr. KEPNER.—If your Honor please, and gentlemen of the jury, this action is entitled Matilda C. Neasham, Plaintiff, versus the New York Life Insurance Company, a Corporation, Defendant. I will not take the time to read the pleadings, but will state the substance of the complaint. The plaintiff alleges that in July, 1914, the defendant company made and delivered its policy of life insurance, numbered 4707986, on the life of her husband, William C. Neasham, wherein and whereby the defendant promised and agreed to pay to the plaintiff the sum of Ten Thousand Dollars upon proof of the death of William C. Neasham, the insured, [62] The insurance policy will be exhibited to you. The plaintiff further alleges that on the 27th day of February, 1915, while the policy by its terms was in force, the insured, William C. Neasham, died. The plaintiff further alleges that on the 15th day of March, 1915, she furnished defendant company with due proof of the death of her husband; and she further alleges that she has performed all the conditions on her part to be performed. She alleges further that the defendant has not paid the policy, or any part of it, and that the full amount of the policy has been due

and unpaid since the date of the furnishing of the proofs of loss to the defendant company.

The COURT.—I think it would be in order, Mr. Kepner, for you to outline briefly to the jury what you expect to prove to maintain your case; you forgot it, perhaps, by stating the pleadings.

Mr. KEPNER.—If your Honor please, the position I take is, in order to maintain and establish the case, is proof of the facts which I have outlined.

The COURT.—Well, perhaps you are right about that. You see, it is not admitted that the deceased died, so your evidence will have to show his death, and that will involve showing the means by which he died.

Mr. KEPNER.—Showing that he died?

The COURT.—Yes.

Mr. KEPNER.—I think, if your Honor please, we are anticipating just a little, perhaps. Under the terms of the policy, death is the only thing we have to prove; and we will prove death. I might state, in order that the jury may understand the form that this controversy will take, that the defendant, as I understand it, will contend that the insured died by his own hand, or by his own act; the plaintiff on her part, will contend as to that point that the insured came to his death at the hands of some person or persons unknown—some person or persons other than the insured. I think, if you Honor please, that is all I care to state at this time.

The COURT.—That is sufficient.

Mr. HAWKINS.—As I understand, your Honor,

I may make my statement when I begin my proof?  
The COURT.—Certainly.

Mr. KEPNER.—I will call Mrs. Neasham. [63]

**Testimony of Mrs. Matilda C. Neasham, in Her Own  
Behalf.**

Mrs. MATILDA C. NEASHAM, the plaintiff, called as a witness, after being sworn, testified as follows:

Direct Examination.

(By Mr. KEPNER.)

Q. You may state your name.

A. Matilda C. Neasham.

Q. Where do you reside, Mrs. Neasham?

A. In Reno.

Q. Whereabouts in Reno?

A. 607 North Virginia Street.

Q. What is your situation in life as to being married?

Mr. HAWKINS.—I will admit that Mrs. Neasham is the widow of William C. Neasham, the insured named in the policy.

Mr. KEPNER.—(Q.) When were you married to William C. Neasham?

A. June 17th, 1901.

Q. And you lived together as husband and wife until the time of his death? A. We did.

Q. When did Mr. Neasham die?

A. The 27th of February, 1915.

Q. That would be the 27th of February last year?

A. Yes.

Q. Of what does your family consist, Mrs. Neasham?

(Testimony of Mrs. Matilda C. Neasham.)

Mr. HAWKINS.—I object to the question as incompetent, irrelevant and immaterial; it does not tend to prove or disprove any issue in the case.

The COURT.—I am inclined to agree with that; it is purely a contract.

Mr. KEPNER.—I don't insist on it.

Q. Look at the document which I hand you, Mrs. Neasham, and state if you ever saw that instrument before, and when? (Hands paper to witness.)

A. This policy was handed to me in the latter part of July, 1914.

Q. How long did it remain in your possession?

A. Until March, 1915.

Q. After the death of your husband? A. Yes.

Q. And then what became of it?

A. I delivered it to you, Mr. Kepner.

Mr. KEPNER.—We offer the policy in evidence, and ask that it be marked Plaintiff's Exhibit "A."

Mr. HAWKINS.—I presume that is the policy you set out as Exhibit "A" in your complaint?

Mr. KEPNER.—It is the original of the policy which is attached to the complaint as Exhibit "A."

[64]

Mr. HAWKINS.—Under the statement of counsel, I have no objection.

(The policy is admitted in evidence, and marked Plaintiff's Exhibit "A.")

Mr. KEPNER.—If your Honor please, I will read the first page of this policy to the jury. There are a large number of conditions appearing on other



(Testimony of Mrs. Matilda C. Neasham.)

pages that I do not deem it essential to read at this time.

Mr. HAWKINS.—I suppose it may be considered as all read, your Honor.

The COURT.—It is all in evidence, and may be read by either party.

(The following is read to the jury by counsel for plaintiff:)

“New York Life Insurance Company by this policy of insurance agrees to pay TEN THOUSAND DOLLARS at the Home Office of the Company in the City and State of New York to Matilda C., wife of the insured, Beneficiary, (with the right on the part of Insured to change the Beneficiary as hereinafter provided) upon receipt at said Home Office of due proof of the death during the continuance of this contract, of William C. Neasham, the insured. This insurance is granted in consideration of the payment of the first premium of Four Hundred fifty-six 90/100 Dollars the receipt of which is hereby acknowledged, constituting payment for the period terminating on the Tenth day of July in the year Nineteen Hundred and fifteen and the payment of a like sum on said date and on the Tenth day of July in every year thereafter during the continuance of this Policy until the death of the Insured.

This policy is free of conditions as to residence, travel, occupation, or military or naval service, and shall be incontestable after one year from its date of issue except for nonpayment of premium. After its delivery to and receipt by the Insured this Policy

(Testimony of Mrs. Matilda C. Neasham.)

takes effect as of the Tenth day of July, Nineteen Hundred and fourteen.

The benefits and provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Twenty-third day of July Nineteen Hundred and fourteen.

SEYMOUR M. BALLARD, Secretary.

DARWIN P. KINGSLEY, President. [65]

N. BERGHULZ, Assistant Registrar.

Insurance payable at death: Premiums payable during Life.”)

Mr. KEPNER.—(Q.) After the death of your husband, as you have stated, I will ask you to state whether you furnished the defendant company with proofs of death?

Mr. HAWKINS.—I submit that would be a conclusion, your Honor. She can state what she did.

The COURT.—Yes, I think you should inquire what she did, whether they were proofs of course would be a conclusion.

Mr. KEPNER.—(Q.) What did you do after the death of your husband, Mrs. Neasham?

A. In regards to this case, this policy?

Q. Yes. A. I furnished proofs of death.

Q. Those proofs were in writing?

Mr. HAWKINS.—Just a minute. I move the answer be stricken.

(Testimony of Mrs. Matilda C. Neasham.)

The COURT.—Yes; the answer was a very natural one, though, in reply to the question. Are not the proofs in writing?

Mr. KEPNER.—Yes, your Honor.

The COURT.—Have they been requested?

Mr. KEPNER.—If in answer to the question she says she furnished proofs in writing, then I will ask the defendant company under our stipulation to produce them, and they will be offered; the question is really a preliminary question.

Mr. HAWKINS.—Counsel asked us to produce them, and I agreed to have them here for his benefit, to be offered in evidence, and I have them, and he may offer them in evidence at this time, if he so desires.

Mr. KEPNER.—Before that is done, in order that the record may be straight, I deem it proper that the question be asked as to whether proofs were furnished.

The COURT.—The proper way would be to hand her these documents, and ask her to state what she did with them, and matters of that kind; then the documents are identified, and may go in evidence; but her answer is a conclusion, because whether these documents do amount to proof of death, as a matter of law, is a legal conclusion to be deduced from their contents, and which, of course, the witness is not competent to state, though the answer was a very natural one for her to give. [66]

Mr. KEPNER.—The proofs, if your Honor please, as presented to me by counsel, are not the

(Testimony of Mrs. Matilda C. Neasham.)

complete proofs which were presented to the company.

Mr. HAWKINS.—I will state we have a written stipulation covering it, and what I have furnished is all counsel asked for, and all that is covered by the written stipulation; it is all I know that was ever furnished the Company.

Mr. KEPNER.—(Q.) Look at these papers I hand you, Mrs. Neasham, numbered one, two and three, and state what they are? (Hands to witness.)

A. This is the original that I signed as the proof of my husband's death.

Q. That is, that was executed by you?

A. Yes; they are somewhat marked up since I last saw them.

Q. And the others?

A. They are about the same in substance.

The COURT.—(Q.) Signed by the physician, or by whom?

A. One by the physician, and the other by attorney—one by C. R. Carter of Reno, one by a physician, and one by myself.

Mr. KEPNER.—(Q.) What is the physician's name? A. Doctor Gibson.

The COURT.—(Q.) It shows on the paper, doesn't it? A. Yes, Doctor Gibson.

Mr. KEPNER.—(Q.) And these papers you have just identified after examining them, what was done with them after they were executed?

A. I delivered them to you.

Q. Do you know whether or not they were deliv-



(Testimony of Mrs. Matilda C. Neasham.)

ered to the defendant company?

The COURT.—Mr. Kepner, is there any question made by them that they received those papers?

Mr. HAWKINS.—We admit we received them.

The COURT.—If it is admitted why not offer them in evidence; those questions are unnecessary.

Mr. KEPNER.—If they admit it, I do offer them in evidence, and ask that they be attached together and marked Plaintiff's Exhibit "B."

(The papers are admitted in evidence and marked Plaintiff's Exhibit "B.") [67]

Mr. KEPNER.—(Q.) After furnishing these proofs, which you have identified, and which have been offered in evidence, did you hear anything from the defendant company? A. Yes.

Q. What was it?

Mr. HAWKINS.—If the Court please, I don't see the purpose of that question; I object to it on the ground it is incompetent, irrelevant and immaterial.

The COURT.—The only question is whether they paid this policy.

WITNESS.—They did not.

Mr. KEPNER.—(Q.) Did you get a letter from them?

A. No, I did not; on the 23d day of April, Judge Cheney and A. P. Rush as I understand the state agent—

Mr. HAWKINS.—Just a minute. I object to that, if the Court please. We admit that we have not paid the policy.

The COURT.—What is the purpose of this?

(Testimony of Mrs. Matilda C. Neasham.)

Mr. KEPNER.—I think it is proper for us to show whether or not any objection was made to the proofs which were submitted.

The COURT.—You can ask the witness that question, whether any objection was made, because that is a fact, whether it was an objection or not.

Mr. KEPNER.—(Q.) Was there any objection ever made, Mrs. Neasham, to the proofs of death as you delivered them to the company?

A. The only objection is, as I stated, in April Judge Cheney and a gentleman, A. P. Rush, I believe, are his initials, called at my residence and offered to deliver to me four hundred and—

Mr. HAWKINS.—Just a minute. I object to that.

The COURT.—Just answer the question whether they ever made any objections to the sufficiency of the proof of death you made, that is all you were asked.

A. Not to my knowledge; not to me, personally.

Q. They have not paid the policy?

A. No, they have not paid the policy.

Mr. KEPNER.—(Q.) They have not made any objection to the proofs? A. No.

Mr. KEPNER.—You may cross-examine. [68]

Mr. HAWKINS.—(Q.) So far as you know, Mrs. Neasham, they never made any objection to the proofs to you? A. No, they did not.

Q. So far as you know? A. No.

Mr. HAWKINS.—No cross-examination.

Mr. KEPNER.—If your Honor please, Mrs. Neas-

(Testimony of Mrs. Matilda C. Neasham.)

ham says she made a mistake of ten years as to when she was married.

The COURT.—Well, she can correct that, if she wishes.

WITNESS.—It should be 1891.

Mr. KEPNER.—Plaintiff rests.

Mr. HAWKINS.—If the Court please, at this time the defendant desires to interpose a motion as follows:

The COURT.—What is the nature of the motion, for a nonsuit or an instructed verdict?

Mr. HAWKINS.—It is in the nature of a motion for an instructed verdict as to the ten thousand dollars, or as a nonsuit. There is in this district some question as to whether the form of motion should be for a nonsuit or for an instructed verdict, and, to avoid any question, we usually make it in both forms; so I desire to make this motion in both forms, as a motion for a nonsuit and for an instructed verdict as to the ten thousand dollar claim.

Comes now the defendant, New York Life Insurance Company, by its attorneys, at the conclusion of all the evidence offered by the plaintiff herein, and moves the Court for a nonsuit, and to direct a verdict for the defendant upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of ten thousand dollars as the amount of the insurance under said contract, Exhibit "A" to the complaint herein. Said motion is made upon the grounds and for the reasons as follows, to wit:

1. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit "A" attached to and made a part of the complaint.

2. That it appears from the face of the complaint:

(a) That in event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have [69] been paid to and received by the company, and no more.

(b) That the first insurance year under said contract, Exhibit "A" to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

(c) That the insured, William C. Neasham, during said first insurance year, and on to wit, the 27th day of February, 1915, died.

(d) That by the terms of said contract, Exhibit "A" to the complaint, the amount of the insurance thereunder is fixed and determined by the facts applicable thereto, as therein stated; and the amount plaintiff would be entitled to receive as the amount of insurance under said contract upon the death of the insured, William C. Neasham, depends upon the fact, did or did not the insured, William C. Neasham, destroy or kill himself.

(e) That said insured, William C. Neasham, may have killed or destroyed himself, in which event the insurance under said contract, Exhibit "A" to the complaint, was not ten thousand dollars, but was the



sum of \$456.90, and no more.

3. That plaintiff's pleadings and proof establish, among other things, the following facts, to wit, that the insured, William C. Neasham, came to his death from a gunshot wound; that said gunshot wound was of the head and brain, and that death was instantaneous.

4. That to entitle plaintiff to recover said sum of ten thousand dollars as the amount of the insurance under said contract, Exhibit "A" to the complaint, it must be made to appear as a fact that the insured, William C. Neasham, is dead, and that his death was from some cause by reason of which, under the express terms of the contract, plaintiff is entitled to receive the said ten thousand dollars. That while it is admitted in the pleadings and established by plaintiff's proof, that the insured, William C. Neasham, came to his death from a gunshot wound, there is no proof of any fact from which it can be determined that said insured, William C. Neasham, did not destroy or kill himself.

5. That plaintiff has failed to establish the material fact alleged in paragraph four of the complaint, and denied in paragraph three of the amended answer, that plaintiff furnished defendant with due proof of the death of the insured, William C. Neasham; that the proofs of [70] death offered in evidence by plaintiff do not constitute due proof of death as is required by the contract, Exhibit "A" to the complaint, in that it appears from said proofs of death that the insured came to his death from a gunshot wound of head and brain, and that death was

instantaneous, but it does not appear therefrom whether the insured did or did not destroy himself; and inasmuch as defendant's obligation under the contract, Exhibit "A" to the complaint, in case of self-destruction during the first insurance year was for a sum equal to the premiums thereon paid to and received by the company, and no more, and that the premium was not ten thousand dollars, and does not exceed \$456.90, the extent of defendant's obligation could not be determined from the proofs of death in evidence as proofs of death furnished by plaintiff to the defendant company.

6. That plaintiff has failed upon the trial to prove a sufficient case for the Court and jury, in so far as plaintiff seeks to recover a judgment in the sum of ten thousand dollars as the amount of the insurance, and said amount being one of the sums specified in said contract, Exhibit "A" to the complaint, to be paid to plaintiff as the amount of the insurance upon the establishment of certain facts; but the facts essential to plaintiff's right to recover said sum of ten thousand dollars under said contract, Exhibit "A" to the complaint, as the amount of the insurance, have not been established by plaintiff's evidence.

The COURT.—(After argument on the motion.) The motion will be denied, and you may have an exception.

Mr. HAWKINS.—Very well, your Honor. I ask for an exception for the reasons stated in the motion, and the grounds therefor.

The Court admonishes the jury, and a recess is taken until 2 o'clock P. M.

Wednesday, March 8th, 1916.

AFTER RECESS—2 P. M.

(All parties present.)

The COURT.—Proceed.

(Counsel for defendant makes an opening statement to the jury.)

Mr. HAWKINS.—I will call Mr. Hammersmith.  
[71]

**Testimony of George N. Hammersmith, for  
Defendant.**

Mr. GEORGE N. HAMMERSMITH, called as a witness on behalf of the defendant, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. HAWKINS.)

Q. Your name is George N. Hammersmith?

A. Yes; George N. Hammersmith.

Q. You live at Sparks, in Washoe County, Mr. Hammersmith?     A. Yes, sir.

Q. Were you acquainted with William C. Neasham, referred to in this suit, during his lifetime?

A. Yes, sir.

Q. How long had you known him?

A. Oh, I suppose about eight or ten years.

Q. It is admitted in the record that Mr. Neasham died, and was killed by some one, either himself or some one else, on February 27, 1915; where were you on that day?     A. In Reno.

Q. Did you or not see Mr. Neasham that day?

A. I did.

Q. Where was he when you saw him?

(Testimony of George N. Hammersmith.)

A. Down near the stock corrals—passing down by the stock corrals.

Q. Stock corrals?      A. Yes.

Q. And where are they located?

A. Just at the east end of the Reno yards.

Q. Along the line of the Southern Pacific Railway Company, extended from Reno to Sparks?

A. No, just in the Reno yard.

Q. What was your business or occupation at that time?      A. Switchman.

Q. What were you doing at this particular time that you saw Mr. Neasham on the day of February 27, 1915?

A. I was standing down in the yard waiting for number six to go by.

Q. What time of day was it?

A. Between eight-fifteen and eight-forty-five.

Q. In the morning?

A. In the morning, yes, sir.

Q. What time is number six due to pull out from Reno, going east?      A. Eight-thirty.

Q. How far, approximately, were you from Mr. Neasham on Saturday morning, the 27th of February, between eight-fifteen and eighty-fourty-five o'clock?

A. Well, just about as far as from here to the edge of the street. [72]

Q. He was going in what direction?

A. Going east.

Q. Was he alone or with any one?      A. Alone.

Q. Going east would be towards Sparks?



(Testimony of George N. Hammersmith.)

A. Towards Sparks; yes, sir.

Q. And about how far from the depot in Reno was Mr. Neasham at this particular time when you saw him walking along, going east?

A. Well, I can't judge the distance from the depot to the stock corrals but it must be about pretty near two blocks; that is, from the depot to where the stock-corrals are situated, it is about two blocks.

Q. Do you mean two railroad blocks?

A. No, two blocks.

The COURT.—Two city blocks?

A. Two city blocks, yes, from the depot to the stock-yards, just about two city blocks; that is from the passenger depot at Reno to the stock-corrals.

Mr. HAWKINS.—(Q.) About two city blocks?

A. About two city blocks.

Q. And it was along there that you saw Mr. Neasham? A. There where he passed.

Mr. HAWKINS.—That is all.

Cross-examination.

Mr. KEPNER.—(Q.) How long did you say you had known Mr. Neasham?

A. About eight or ten years.

Q. Did you speak to him on this occasion?

A. No, there was nobody spoke to him.

Q. Did you speak to him?

A. Not that I remember of.

Q. Are you positive about the time of day that you saw him?

A. No, I could not be positive about the time of day; I was down there at the east end of the yard

(Testimony of George N. Hammersmith.)

waiting for number six to go by when he passed; it was somewhere between eight-fifteen and eight-forty-five—I was waiting for number six to go by.

Q. Do you know whether or not number six was on time that morning?

A. Yes, number six was on time.

Q. If number six was on time that morning, and left on time, number six left at eighty-twenty-six, didn't it?

A. I don't know I am sure; I could not state, it is so long ago. [73]

Q. On the morning of February 27, it left the Reno depot at eight-twenty-six A. M.

A. I don't know what time she left, I could not say.

Q. If it be a fact that number six left the Reno depot that morning at or about eight-thirty, and if it be a fact you were waiting for number six, and you saw Mr. Neasham during that time while you were waiting for number six, you saw him before eight-thirty?

A. I saw him between eight-thirty and eight-forty-five, I don't know just what time it was.

The COURT.—(Q.) What he is asking you is this: You said you saw him at the place you have indicated between eight-thirty and eight-forty-five?

A. Eight-fifteen and eight-forty-five, but I don't know exactly what time it was.

The COURT.—Eight-fifteen and eight-forty-five; then it might be before eight-thirty, if number six did leave Reno at eight-twenty-six?

Mr. KEPNER.—Yes. (Q.) If number six left

(Testimony of George N. Hammersmith.)

Reno on time, and you were waiting for number six when Mr. Neasham passed the point where you were waiting, he would have passed that point where you were waiting before eight-thirty?

A. No, I could not say whether it was before eight-thirty, or after.

The COURT.—It is a mere matter of figures; the witness can state the time.

A. I can't state the time that he passed there.

Mr. KEPNER.—(Q.) You didn't see anyone with him?

A. No, sir, I didn't see anybody with him at all.

Q. And you didn't speak to him?

A. No, sir, I didn't speak to him at all; there was nobody spoke to him.

Q. You always did speak when you met, did you?

A. Yes.

Q. Nevertheless, on this occasion you didn't speak?

A. No, he was too far away; I was sitting on the side there, and I didn't see anything of him to speak to him.

Q. You didn't see him again that day?      A. No.

Mr. KEPNER.—That is all. [74]

**Testimony of F. K. Unsworth, for Defendant.**

Mr. F. K. UNSWORTH, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination.

(By Mr. HAWKINS.)

Q. Mr. Unsworth, you live in Reno, Nevada?

(Testimony of F. K. Unsworth.)

A. I do.

Q. You are Justice of the Peace and *ex-officio* Coroner of that precinct are you?

A. Of Reno Township, Washoe County, Nevada.

Q. And you held such positions on February 27, 1915? A. I did.

Q. On that date you received information concerning a party who had been shot at a point east of Reno, did you? A. I did.

Q. You repaired to the place where the party was shot, did you? A. I did.

Q. Who did you find there at that place?

A. I found the body of W. C. Neasham.

Q. Where was that, Mr. Unsworth?

A. It was at a point about three-quarters of a mile west of the Asylum crossing, on the Southern Pacific right of way, between Reno and Sparks.

Q. That was between Reno and Sparks?

A. It was.

Q. Along the line of the Southern Pacific Railroad right of way? A. It is.

Q. About how far was this point where you found the body of Mr. Neasham east of Reno?

A. From the depot at Reno, I should estimate it at about two and a half or two and three-quarter miles east of Reno.

Q. How far was the body away from the right of way of the Southern Pacific Railroad track?

A. It was about sixteen feet to the south of the Southern Pacific track, in a little hollow or pit, parallel with the Southern Pacific track.



(Testimony of F. K. Unsworth.)

The COURT.—(Q.) Southern Pacific main line?

A. Main line.

Mr. HAWKINS.—(Q.) Travelling easterly along the Southern Pacific Railroad at that point, on which side of the track was the body?

A. On the right-hand side.

Q. Right-hand side going east; and you say it was about sixteen feet off, down in a cut or pit?

A. It was.

Q. What was the nature of the ground in that cut or pit where you found [75] the body, as to being soft or hard?

A. The ground was soft; that is, the condition of the ground itself was soft from moisture.

The COURT.—(Q.) What do you mean by a pit, what sort of a pit? A. A sort of a dug-out.

Mr. HAWKINS.—(Q.) Will you explain the surroundings there a little more fully, Mr. Unsworth, as to the nature of that pit; what was the character of the soil in there?

A. The soil itself was a sand and fine gravel, which was damp.

Q. Sand and fine gravel, and was damp?

A. Yes.

Q. Was there a wagon way through it?

A. There was.

The COURT.—(Q.) There was a wagon way running through this pit? A. Yes.

Q. Was the body found by the wagon way or on it?

A. The body was partly in the bottom of the pit and partly to the side.

(Testimony of F. K. Unsworth.)

Q. Partly to the side of what?

A. Of the pit or dug-out.

Q. On the wagon way, was it?

A. The feet rested toward the wagon way, and the rest of the body was in a reclining position on the bank, or slope of the pit.

Mr. HAWKINS.—(Q.) About how wide was this pit, Mr. Unsworth, at the place where you found the body?

A. I should judge it to be eighteen or twenty feet across.

Q. And about how deep were these sloping banks coming down to the bottom?

A. From twelve to sixteen feet.

Q. You say the bottom of this pit was sandy, and of gravel, and it was damp? A. It was.

Q. Who, if any one, went with you when you went to this point after being notified of the event to which you have testified?

A. C. P. Ferrell, Sheriff of Washoe County, and Mr. Frank Chick, a member of the Perkins-Gulling Undertaking Company.

Q. That is F. O. Chick? A. F. O. Chick.

Q. When you arrived at the point where the body was, did you approach the body at that time immediately? A. I did not.

Q. Who in your party, if anyone, did?

A. The sheriff, Mr. Ferrell.

The COURT.—(Q.) Was there snow on the ground? A. No, there was not. [76]

Mr. HAWKINS.—(Q.) After the sheriff had ap-

(Testimony of F. K. Unsworth.)

proached the body, did you thereafter approach to the body?     A. I did.

Q. Had the body been moved in any way from the time you got there until you approached close to it?

A. It had not.

Q. Will you state the condition or position of the body at that time?     A. As I stated before—

The COURT.—In what respect do you mean? You don't want him to repeat things that he has already said; he has already described how the body lay. I would not have mere repetitions, because it does not add anything.

Mr. HAWKINS.—(Q.) What position were the hands of the deceased when you approached the body?

WITNESS.—If I might be permitted to explain a little more fully as to the position of the body, Judge.

The COURT.—Yes, go ahead.

A. The body was facing west, in a reclining position; the deceased was lying on his right side, with one arm underneath, and the other one across his chest.

Mr. HAWKINS.—(Q.) Did you observe when you first approached, whether or not there was a pistol or gun near the deceased?     A. I did.

Q. Was there or was there not a pistol there?

A. There was.

Q. Where was it?

A. The pistol was on the ground, about four inches below the right hand of the deceased.

(Testimony of F. K. Unsworth.)

Q. Did you or not observe the condition of the deceased's clothing at that time, as to whether or not it was in order or disarranged? A. I did.

Q. And what was the condition in that regard?

A. They seemed to be in order.

Mr. KEPNER.—(Q.) What is that?

A. They seemed to be in order.

Mr. KEPNER.—I move that be stricken out as not responsive. The witness can state the fact, but cannot state what seemed to be the fact.

The COURT.—Well, I am not inclined to agree with you, because what we understand by the term “in order” with reference to wearing apparel—was it in accordance with the usual manner of wearing it, or had [77] it been disturbed, or in anywise, I suppose, torn, or otherwise disarranged. Is that what you mean, that it did not appear to have been disturbed?

WITNESS.—To have been disarranged or disturbed.

Q. Did not appear to be? A. Did not.

Q. What clothing did he have on?

A. He had on—from external view?

Q. Yes, that is what I mean—outer clothing I mean.

A. A shirt, collar, tie, vest, trousers and coat.

Q. The usual outer wearing apparel? A. Yes.

Mr. HAWKINS.—(Q.) I understand it did not appear to have been disarranged in any manner?

A. It did not.

Q. Did you observe the ground around where the



(Testimony of F. K. Unsworth.)

body lay, to see whether or not there was any evidence of any struggle, or other persons being near the body? A. I did.

Mr. KEPNER.—If your Honor please, I think I will object to that. I have no objection to the witness stating what he observed, but I object to his expressing any opinion from what he saw.

The COURT.—The proper thing is to ask him what the appearances of the ground were as to evidence of any others having been present, and let the jury draw the inference as to whether there had been a struggle. If there was any evidence of the ground being torn up, or tracks of others near, or anything of that kind, that can be stated, and the jury will draw the inference that the witness has undertaken to state.

Mr. HAWKINS.—(Q.) State, Mr. Unsworth, whether there were any evidences of other persons having approached to the body.

Mr. KEPNER.—I will object to it.

The COURT.—Objection sustained. That calls for his conclusion; that is for the jury to draw.

Mr. HAWKINS.—(Q.) State the condition of the ground, as to what appeared thereon, if anything, with reference to persons having approached the body.

Mr. KEPNER.—Same objection.

The COURT.—What counsel wants you to state, Mr. Unsworth, is the condition of the ground in the vicinity of the body, indicating whether [78] or no others had been present before you got there,

(Testimony of F. K. Unsworth.)

tracks, or anything of that kind, human tracks.

WITNESS.—Am I permitted at this time to testify to that, your Honor?

The COURT.—Yes.

A. I saw no other tracks or foot-prints in the immediate vicinity where the body lay; the only foot-tracks were the foot-tracks of one person, that led to where the body lay.

Mr. HAWKINS.—(Q.) Did you examine the effects that were on the body? A. At that time?

Q. Yes.

A. I did, with the exception of one article.

Q. What did you find upon the body?

A. I found on the body or with the body, money to the value of two dollars and a half; one Parker fountain pen, one pocket comb and case; one gold watch, which had a label of R. Herz thereon; a chain and charm; one pocket knife; one purse; one Savage automatic revolver, caliber thirty-two, number 54589 (R).

The COURT.—(Q.) You are speaking of a revolver now on the person, besides the one near the hand?

A. No, your Honor, I said I found on the body or with the body.

Q. He is asking you now solely with reference to the effects you found on the body?

A. You may strike that Savage automatic revolver.

Q. You didn't find any revolver on the body?

A. No, I did not, your Honor. Books, papers, let-

(Testimony of F. K. Unsworth.)

ters, one lead pencil, and stick-pin.

Mr. HAWKINS.—I want to go back just a minute, your Honor.

Q. The ground in the vicinity of the body, you have testified to its condition, did it or not show the tracks that were around there distinctly or clearly, or not?

Mr. KEPNER.—Object to that as calling for the conclusion of the witness, and also because it has already been answered.

The COURT.—Well, he has answered about the character of the soil, and its state as to being damp; the jury is to draw these inferences.

Mr. HAWKINS.—If the Court please, may I just observe this: Sand might be damp, and it might show the tracks, and another kind might be quite different; the object of this question is to find out from this [79] witness as a fact, whether a track made there, a person stepping would clearly leave a track.

The COURT.—Leave a clear impression?

Mr. HAWKINS.—Yes.

The COURT.—Well, I will let him answer that.

WITNESS.—What is the question?

(The reporter reads the question.)

A. The ground showed the tracks distinctly and clearly.

Mr. HAWKINS.—(Q.) Will you describe the pistol which you said a moment ago you found within three or four inches of the hand of the deceased?

A. The pistol was a Savage automatic revolver, caliber thirty-two, number 54589 (R).

(Testimony of F. K. Unsworth.)

Q. While you were there did you or not observe in the immediate vicinity of the body an empty cartridge shell?     A. I did.

Mr. KEPNER.—That is objected to as leading.

The COURT.—Yes, it is; don't put anything in your witness' mouth; ask him what he found there; and strike that out.

Mr. HAWKINS.—I withdraw the question. (Q.) What did you find in the immediate vicinity of the body in reference to a shell?

Mr. KEPNER.—That is leading.

The COURT.—It is objectionable as suggestive. Ask him what he found. Depend on your witness to tell what he found; don't suggest it to him, he is a bright witness.

Mr. HAWKINS.—(Q.) What did you find there beside the body, other than the pistol which you have mentioned?

A. I found one empty cartridge shell.

Q. What was the size of it?

A. Thirty-two caliber.

Q. Did you take it or not?     A. I did.

Q. What did you finally do with it?

A. I turned it over to the County Treasurer of Washoe County, together with the other articles.

Q. What finally became of this revolver which you have mentioned, if you know?

A. I do not, except that it was turned over to the County Treasurer of Washoe County.

Q. By whom?     A. By myself as coroner. [80]

Q. When you approached the body what did you



(Testimony of F. K. Unsworth.)

see in reference to the physical condition of the body, other than what you have testified to, if anything?

A. The body showed no signs of external violence with the exception of—

Mr. KEPNER.—If your Honor please, I move that be stricken out as the expression of the witness.

The COURT.—That may go out.

WITNESS.—I found blood oozing from the mouth and nose of the deceased.

Mr. HAWKINS.—(Q.) Did you or not find any blood at any other portion of the body?

A. I did not.

Q. Were there or not any other wounds upon the body?      A. I found no other.

Mr. KEPNER.—What was the answer?

A. I found no other.

Mr. HAWKINS.—(Q.) Did you examine the body at that time to see what caused this blood in the nose and mouth?      A. I did not.

Q. Do you know what caused it?

Mr. KEPNER.—If he knows of his own knowledge, I have no objection to his stating it.

WITNESS.—I was just going to suggest, Mr. Kepner, that I know simply from the knowledge of the physician that performed the autopsy.

Mr. KEPNER.—I didn't hear what he said.

The COURT.—He only knows, he says, from the statement of the physician who performed the autopsy.

Mr. KEPNER.—I object to his stating anything about it then.

(Testimony of F. K. Unsworth.)

Mr. HAWKINS.—He has not stated. (Q.)  
What became of the body?

A. The body was removed to the parlors of the Perkins-Gulling Undertaking Company.

Q. By whom?

A. By the Perkins-Gulling Company, under my direction.

Q. Mr. F. O. Chick, the man you mentioned a while ago, who did he represent?

A. He represented the Perkins-Gulling Company.

Q. State whether or not the body was removed by him under your directions, to the Perkins-Gulling Undertaking Company parlors.

A. It was, with the assistance of another member of the firm, Mr. S. [81] E. Ross.

Q. Did you see the body after it was removed to Reno? A. I did.

Q. Did you examine it afterwards, with a view of ascertaining where the gunshot wound was?

The COURT.—He has not testified to any gunshot wound.

Mr. HAWKINS.—It has been admitted in the pleadings that he came to his death by a gunshot wound.

Mr. KEPNER.—The witness said that he didn't know, except what he had been told by somebody else.

The COURT.—Well, there is no objection to asking if he examined it afterwards to ascertain what wounds, if any, were on the body. The fact it has been admitted would not necessarily imply that this

(Testimony of F. K. Unsworth.)

witness would know a gunshot wound when he saw it.

Mr. HAWKINS.—(Q.) Did you examine the body afterwards with a view of ascertaining what wounds had been received?

A. I viewed the remains at the morgue, and saw a wound in the mouth, the upper portion of the mouth, up into the skull.

Q. Was there any other wound on the deceased at that time that you saw? A. I didn't see any other.

Mr. HAWKINS.—That is all.

Cross-examination.

Mr. KEPNER.—(Q.) This pistol that was on the ground, did I understand you to say that Mr. Ferrell picked that pistol up? A. He did.

Q. Did you have it in your possession at all prior to the inquest, which was held on the first of March?

Mr. HAWKINS.—I object to the question as injecting into the case the question of an inquest, as incompetent, irrelevant and immaterial.

The COURT.—The witness has not testified to any inquest.

Mr. KEPNER.—But he has testified that the sheriff took possession of the gun.

The COURT.—You are at perfect liberty to ask him if he had it in his possession, or at any subsequent time, but refrain from referring to a fact that he has not testified to.

Mr. KEPNER.—I understand, your Honor. (Q.) When did you first take possession of the pistol? [82]

(Testimony of F. K. Unsworth.)

A. On the first day of March, 1915.

The COURT.—(Q.) You didn't take the pistol when you found the body?

A. I did not, your Honor.

Mr. KEPNER.—(Q.) Had the pistol been in your possession at all from the time the sheriff took possession of it at the gravel-pit, as you have stated, up to the time it was delivered to you on the first of March?

A. Simply to look at it, and then I handed it back to the sheriff, and told him to keep it until such time as I should call for it.

Q. When was that?

A. That was on the first day of March, 1915.

Q. Now, you say you picked up a shell near the body; what became of the shell?

A. I turned it over to the county treasurer.

Q. You turned the shell over to the county treasurer?     A. I did.

Q. Then the shell was in your possession from the time you picked it up at the gravel-pit until you turned it over to the county treasurer?     A. No.

Q. Whose possession was it in?

A. The sheriff's.

Q. How long did you keep it after you picked it up?

A. Just a moment or two.

Q. And you handed it to the sheriff?     A. I did.

Q. And so far as you know, the sheriff kept possession of the pistol and the shell until the first of March?     A. As far as I know.

The COURT.—(Q.) How do you know it was the



(Testimony of F. K. Unsworth.)

same shell that was handed back to you?

A. I didn't know that it was the same shell further than that it is the same caliber.

Q. You just took the sheriff's representation about that?

A. I directed him to keep it in his custody until I should call for it.

Mr. KEPNER.—(Q.) How recently have you seen this pistol?

A. I think I have seen it within a day of two.

Q. When did you see it last?

A. That is the time, within a day of two; I don't remember whether it was yesterday or the day before.

Q. Yesterday or the day before. When did you make your memorandum as to the number of the pistol?

A. That memorandum was made by the treasurer in my presence at the time the articles were turned over to him. [83]

Q. When was that?

A. It was either the 2d or 3d of March, I believe the 3d.

Q. 2d or 3d of March last year? A. 1915.

The COURT.—(Q.) You saw a pistol, you say, lying near the body? A. I did.

Q. The sheriff took that, did he?

A. He did, and handed it to me; I viewed it, and then—

Q. Handed it back to him. Are you able to testify that the pistol you subsequently received from the sheriff was the same pistol?

(Testimony of F. K. Unsworth.)

A. I am, by the number.

Q. But you had not seen the number before he handed it back to you?     A. I had not what?

Q. You did not testify that you had seen the number before he handed it back to you?

A. I had examined the pistol; I didn't testify that I had seen the number, or anything.

Q. You can't testify by the number that you had seen it before it came back to you from the sheriff?

A. I wasn't asked whether or not I had seen it.

Q. Well, had you, I am asking you?

A. Yes, I had seen the number on the pistol, but I hadn't taken any note of it at that time.

Q. Are you able to recall that it was the same number as you gave it to the treasurer, or when the treasurer took it, as it was that you saw at the time by the body?     A. Yes.

Mr. KEPNER.—(Q.) How do you know it is the same pistol and the same number?     A. As what?

Q. The pistol you picked up on the ground is the same pistol which you saw in the sheriff's possession—the same pistol you delivered to the sheriff, and saw in the sheriff's possession; how do you know it is the same pistol?

A. By remembering the number on it.

The COURT.—(Q.) Will you let me see the memorandum you made of the number?

(Witness hands memorandum to Court.)

A. I have since made this memorandum.

Q. Oh, you didn't make this at that time? [84]

A. No, that is taken from the coroner's inquest.

(Testimony of F. K. Unsworth.)

Q. Were you able to carry in your memory the figures 54589(R)?      A. For two days, yes.

Q. I am not asking about the length of time, I am asking—      A. That was the length of time, yes.

Mr. KEPNER.—(Q.) Now, I don't want to confuse Mr. Unsworth; I understood you to say when I first commenced my examination that you didn't have possession of this pistol until the first of March; I understood you to tell the Court that you had the pistol in your possession for a brief moment at the gravel-pit?      A. That is the testimony.

Q. Which is right, are both statements right?

A. Both.

Q. When did you first charge your memory with the number of this pistol?

A. When I was upon the ground; the sheriff and myself and Mr. Chick all remarked about the pistol, and examined it at that time.

Q. And ever since that time you have known the number of this pistol?

A. No, I didn't attempt to remember it after the inquest.

Q. Was the number of this pistol mentioned at the inquest?

A. That I can't remember, the testimony, the record will tell you.

Q. If it was mentioned it is in the record of the proceedings, is it?      A. If it was what?

Q. If the number of that pistol was mentioned at the inquest, the number appears in the record of the proceedings?

(Testimony of F. K. Unsworth.)

Mr. HAWKINS.—I object to the question on the ground it is not proper cross-examination.

The COURT.—Oh, yes, it is proper cross-examination.

Q. You held the inquest, didn't you?     A. I did.

Q. He is asking you if the number was mentioned at that inquest, it will be found in that record?

A. Not necessarily.

Q. Why not?

A. I might have discussed it with the sheriff before the hearing itself; it would not necessarily appear in the record.

Q. If the witness testified to it, wouldn't it appear in the record?

A. It might and might not; I don't remember what his testimony was.

Q. Don't you have it taken down in shorthand, the testimony at the coroner's inquest?     A. I do.

Q. If it was mentioned by the witness, it would very likely be found [85] there?

A. Yes, if it was mentioned by a witness at that hearing; or we might have discussed it before the hearing itself.

Q. It is not a question of what you might have done; what we want for this jury is what did occur, not what might have happened; it is an important question.     A. I cannot at this time state.

Q. Human memory is fallible, of course. I understood you to say you recognized this as the same pistol because you could remember the number.

A. That is true, your Honor, but what I am at-



(Testimony of F. K. Unsworth.)

tempting to state at this time is that I don't know whether that number was brought out at the hearing itself, or whether when I talked the matter over with the sheriff before the hearing, that I recall it to memory; it would not necessarily appear in the record.

Q. Unless it was in the evidence of some witness?

A. Yes.

Mr. KEPNER.—I think that is all, if you Honor please.

Mr. HAWKINS.—(Q.) I understand you to say you remember the number from your examination on the ground, and that the gun you turned over to the treasurer is the same gun?

A. That is my testimony.

Mr. HAWKINS.—That is all.

**Testimony of Frank Collins, for Defendant.**

Mr. FRANK COLLINS, called as a witness on behalf of the defendant, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. HAWKINS.)

Q. Mr. Collins, you live in Reno?      A. Yes, sir.

Q. How long have you lived in Reno?

A. About twenty years.

Q. What business are you engaged in?

A. The jewelry business, and loan office.

Q. How long have you been so engaged?

A. Two years.

Q. Were you or not so engaged on February 26, 1915?      A. I was.

(Testimony of Frank Collins.)

Q. And prior thereto, and since?

A. Yes, sir.

Q. It is admitted in the record that William C. Neasham came to his death from a gunshot wound—

Mr. KEPNER.—I object to a statement of that fact.

The COURT.—Yes; just ask your question.

Mr. HAWKINS.—It is simply a matter of fixing the date. [86]

The COURT.—The witness must give you his dates.

Mr. HAWKINS.—(Q.) Do you remember the time when Mr. Neasham was discovered shot, out east of Reno?

WITNESS.—Please read the question.

The COURT.—Do you remember the occasion when Mr. Neasham was found shot, out east of Reno?

A. Yes, sir.

Mr. HAWKINS.—(Q.) Did you know Mr. Neasham in his lifetime?

A. Well, I wasn't personally acquainted with him; I knew who he was.

Q. Did you ever have any business transaction with him prior to his death? A. The day before.

Q. What time the day before?

A. About six o'clock in the evening.

Q. What was the nature of that?

A. I sold him a pistol.

Q. What kind of a pistol did you sell him?

A. Thirty-two Savage automatic.

Q. What did he pay you for it?

(Testimony of Frank Collins.)

A. Ten dollars.

Q. What did he say to you in reference to purchasing a pistol from you, if anything—state the conversation which you had at the time?

A. Well, he came in to buy the pistol, and I showed it to him, and he asked me to show him how to load it, and how it worked, which I did, and I told him I didn't have enough shells to fill it, and he said there would be plenty.

Q. How many shells did you put in it?

A. Nine.

Q. How many would the magazine hold?

A. Nine in the magazine and one in the cylinder.

Q. Did you say that was an automatic or not?

A. Yes, sir.

Q. Can you identify the gun which you sold Mr. Neasham the day before he was shot?

A. Yes, sir.

Mr. HAWKINS.—I will state, your Honor, that Mr. Hill, the county treasurer, is supposed to be here on the train this afternoon, with that pistol.

The COURT.—(Q.) You say it was about six o'clock in the evening?      A. Yes, sir.

Q. Of the day before?      A. Yes, sir.

The COURT.—If the train has not come in, go ahead with something else.

Mr. HAWKINS.—We will want to recall this witness after the gun [87] comes.

The COURT.—Are you through with the examination other than that?

Mr. HAWKINS.—I think so.

(Testimony of Frank Collins.)

The COURT.—Then he can be cross-examined as far as his testimony goes, and you can recall him.

Mr. KEPNER.—I prefer not to commence the cross-examination until the direct is finished.

The COURT.—That is agreeable. Is that all of the witnesses then for the present?

Mr. HAWKINS.—Just a minute, if your Honor please.

Q. Did you see Mr. Neasham after his death?

A. Yes, sir.

Q. Where?

A. At Perkins and Gulling's morgue.

Q. Was that the same party to whom you sold the gun the day before?     A. Yes, sir.

Q. Did or not any one from the Chief of Police office come to see you shortly after Mr. Neasham's death, and make inquiries about the gun?

A. Yes, Thornton Read.

Q. Who?

A. Thornton Read, the lieutenant.

Q. In the conversation with Mr. Neasham when he was purchasing the gun, was anything said about additional cartridges?

A. He said that was plenty; I told him there was one short, and he said that was plenty.

The COURT.—he has gone over that once before.

Mr. HAWKINS.—That is all, with the exception of identifying the gun.

Mr. KEPNER.—I prefer not to cross-examine until the gun is produced.



The COURT.—You may step aside then, Mr. Collins.

Mr. HAWKINS.—Now, if the Court please, by stipulation of counsel we have some testimony which we have agreed may be read into the record, and have the same force and effect as if the witnesses were present, and so testified. I suppose I might file that stipulation as part of the record.

Mr. KEPNER.—There is no dispute about the stipulation, if the Court please. The effect of the stipulation is that the testimony of these witnesses before the coroner's jury may be read here with the same effect as though they appeared here. [88]

The COURT.—Just as a deposition.

Mr. HAWKINS.—I will now read the deposition and testimony of Edward Lalonde. (Reads:)

“EDWARD LALONDE, being first duly sworn, deposes and says:

“By the CORONER.—(Q.) Just state your name.

“A. Edward Lalonde.

“Q. State what you know about the circumstances of the finding of the body.

“A. I came from Sparks Saturday morning, and I came along the track, and I noticed a man laying there; he was below the railroad track, and when I got closer to him I heard him snoring very heavily, so I stopped to look. I thought there was something wrong with the man who laid there very still, so I stood around a few minutes, and two men came up, and I called their attention to it; they ran over, and we stood and looked down. I stepped around a little,

and I saw the gun. So I mentioned that we would have to give word to somebody, and there was two of us went down within six feet of him, and looked at him six feet distant, so then we went right away to Coney Island, and went in a private house over there, and telephoned. We waited awhile, and then we walked over to where the man was laying, and we still waited for the sheriff to come, and the man was dead then.

“By Mr. KEPNER.—(Q.) Did you know Mr. Neasham?     A. No.

“Q. Where do you live?     A. Sparks.

“Q. You have lived in this county some?

“A. I have been in Nevada considerable; I go away a good deal of the time.

“Q. What time in the morning was it?

“A. Ten o'clock.

“Q. When you discovered the body, did you notice anybody in the vicinity?

“A. No; not closer than 150 yards.

“Q. Who was it, these two men that you met?

“A. Yes.

“Q. From the east end of the railroad track?

“A. Yes.

“Q. Did you know either of these parties before?

“A. I was acquainted with Mr. Brown.

“Q. By that time they had come up, and were already opposite the body?     A. Yes.

“Q. You say you went down there about six feet?

“A. Yes. [89]

“Q. Did you notice anything unusual about the

appearance of the body?

“A. Yes, there was blood on the mouth, and some blood on the coat.

“Q. Describe how he was lying.

“A. He lay on his right side; his feet were close together, and one hand was up off the ground like that (indicating), and one hand was on his body (indicates on his abdomen), that way.

“Q. Did you notice the revolver that time?

“A. It was very close to the body on the ground.

“Q. At the time that you came up opposite to him on the track, you say that you could hear him breathing?      A. Yes.

“Q. You never got closer to the body on that day than six feet until the sheriff came out?      A. No.

“Q. Then you went down to the body with the sheriff?      A. Yes.

“Q. What is your occupation?

“A. I am a sheep shearer.

“CORONER.—(Q.) You didn’t hear the report from the gun before you—      A. No.”

Mr. HAWKINS.—That is all of Mr. Lalonde’s testimony.

The COURT.—Wasn’t he asked anything about where he came from, or at that time how far away he might have been? He testifies that the deceased was breathing when he got there, or snoring, as he expressed it.

Mr. HAWKINS.—I have read all of his testimony.

The COURT.—The doctor testifies that he died

instantaneously; what I had in mind was, I should think it would have suggested itself to those who were making this examination to ask him where he came from when he come up to the body, because under the circumstances, it might well be that he would necessarily have heard a shot.

Mr. HAWKINS.—Well, you see there wasn't anybody at this inquest.

The COURT.—There were no interested parties at the inquest, just an official inquiry by the coroner alone?

Mr. HAWKINS.—An official inquiry by the coroner, and the distict attorney's office represented; and Mr. Kepner, as shown.

I will read the testimony of Charles Brown.  
(Reads:)

“CHARLES BROWN, being first duly sworn, deposes and says:

“By the CORONER.—(Q.) Your name is Charles Brown?     A. Yes, sir.

“Q. Were you present alongside the railroad track when the sheriff and [90] the coroner and Mr. Chick”—or Frick, it is written here—“arrived to view Mr. Neasham's remains?     A. Yes, sir.

“Q. Were you one of the gentlemen that first discovered Mr. Neasham's body lying there?

“A. Yes, sir.

“Q. Just tell the jury what you did after discovering the man lying there.

“A. We went and phoned to the police.

“Q. How many of you were there?



“A. There was three and a man named Mr. Rudolph, and Mr. Huntsman”—it is written here.

“Q. Just go on.

“A. We went and phoned to the police, and we sent word, and we got them to come up and identify it and look after it.

“Mr. SALISBURY.—Where did you phone from?

“A. From Coney Island.

“Q. What time in the day was it that you discovered the body?

“A. I don’t know, it must have been somewhere along about ten o’clock, somewhere along there. I don’t know exactly.

“Q. Whereabouts do you live?

“A. I am stopping here in Reno at the Clarendon.

“Q. Which direction were you going when you found Mr. Neasham?

“A. We was walking down toward Sparks.

“Q. Going any place in particular?      A. No.

“Q. And the other two gentlemen started with you?

“A. The young man started with me, and the other man I met him right there.

“CORONER.—(Q.) In which direction was the other gentleman whom you met going?

“A. We met there.

“Q. Oh, the three of you met there?

“A. Met right there.

“Q. Who discovered the body first?

“A. Mr. Lalonde.

“Q. Did the three of you, or any of you, go down to the body?

“A. No, we didn’t go down to the body, we just went to the bank and looked over, and this young man was with me. He walked down to the edge of the bank, and he said he thought he seen a revolver there.

“Q. How close to the body did he go?

“A. Probably about thirty feet.

“Q. That is closer than you went?

“A. Yes; he said, ‘I guess the man shot himself; let’s go and get somebody to look after him.’ ”

Mr. KEPNER.—I move that be stricken out; it is a mere expression of opinion. [91]

The COURT.—Well, of course, it is purely an expression of opinion, but under the stipulation that this evidence be read, I don’t see how I can strike it out. Of course, the jury will understand it is purely an expression of opinion.

(Mr. Hawkins continues the reading of the testimony:)

“Q. Mr. Lalonde first called your attention to the body? A. Yes, sir.

“Q. Which one of the three was it that was there when you got there?

“A. Mr. Lalonde. He was going that way and we was going east. Just as we went over to look down we discovered that he had shot himself.

“Q. You didn’t see anyone else in the neighborhood except the other two gentlemen who were with you? A. No, that is all.

“Q. Any of you gentlemen wish to ask any further questions?

“JUROR.—No.”

Mr. HAWKINS.—That is the testimony of Mr. Brown.

The COURT.—Was there no evidence tending to identify who these men were, and where they came from?

Mr. HAWKINS.—Nothing at all; I am reading everything that is here.

The COURT.—I supposed you were, but it is rather a singular thing that it should not have been inquired into by the coroner, where a violent death had occurred.

Mr. HAWKINS.—Evidently they did not think it was necessary to make any further inquiries.

Mr. UNSWORTH.—I will state to your Honor—

Mr. KEPNER.—I object to any statements being made to the Court by the Coroner.

The COURT.—Well, Mr. Unsworth, of course you are not on the stand now, but I don't see any objection to letting the coroner state why he did not make any further inquiry.

Mr. KEPNER.—I object to it, if the Court please?

The COURT.—Very well.

Mr. HAWKINS.—The next is the testimony of Clyde Rudolph. (Reads:)

“CLYDE RUDOLPH, being first duly sworn, deposes and says:

“By the CORONER.—(Q.) Mr. Rudolph, were you with Mr. Brown on Saturday morning?

“A. Yes, sir.

“Q. State whether or not you with Mr. Brown and another gentleman by [92] the name of Lalonde, discovered Mr. Neasham lying in the ditch bed? A. Yes, sir.

“Q. Did you summon the others immediately?

“A. Yes, we went up the track, and he was lying in the ditch, and the other gentleman stayed up, and I went down seven or eight feet. I could see he had shot himself, and I went over and telephoned to the police. That was the best thing—about that time; we waited around there, and the sheriff came in an automobile.

“Q. Whereabouts do you reside?

“A. At the Clarendon Hotel.

“Q. You had started from there that morning?

“A. Yes, we were just taking a walk up, and had a conversation. Mr. Brown knows him, and we finally got talking with him.

“Q. Whereabouts did he join you?

“A. I don't know the places here. We was looking down at the man, and we heard him breathing very heavily.

“Q. You could hear him breathing? A. Yes.

“Q. How far away?

“A. Twelve or fifteen feet.

“Q. Whereabouts were the other gentlemen when you first saw him? A. Right at the sign.”

The COURT.—It doesn't state what sign it was. A railroad sign, possibly.

Mr. HAWKINS.—Crossing. (Reads:)



“Q. Hadn’t you seen him when you were further down the track to the west?

“A. Well, I didn’t pay much attention to it until he was looking down.

“Q. Didn’t you see him when he was looking down?

“A. No, I didn’t pay no attention at all; we met all there together, the three of us.

“Q. You say you noticed the revolver?

“A. Yes, only for me I guess he might have been there yet, by the way he was lying there.

“Q. Didn’t you say that one of his legs were bent under him?      A. Yes.

“Q. Whereabouts was the revolver with reference to him?

“A. About three or four inches from his hand; I did not go near him—about eight feet.

“Q. Could you describe the pistol?

“A. Yes, that is the pistol.

“Q. You could tell that day it was an automatic?

“A. Yes, sir.

“Q. Who did the telephoning?

“A. I did. Well, I called the police. [93]

“Q. And then you and Mr. Brown and Mr. La-londe came back to town?

“A. No, we came back with the sheriff; we all rode back in the auto with the sheriff.

“Q. After you went up to phone to Reno, did you go any closer to the body?

“A. Yes, sir, we went back there before the sheriff arrived. He had stopped breathing and everything,

and I guess he was dead before that time.

“Q. What time in the day was that?

“A. We left here about nine-thirty, and walked slow.

“CORONER.—(Q.) Were you just out for a walk?

“A. Yes, just for a walk, and was heading towards Sparks.

“Q. Are you and Mr. Brown accustomed to taking a walk every day?     A. No, not every day.

“Q. You have known Mr. Brown some time?

“A. No, just met him there at the hotel.

“Q. You didn't know Mr. Lalonde?

“A. No, I didn't know him at all.

“CORONER.—Anything further, gentlemen?

“JUROR.—No.”

The COURT.—Have you not other witnesses here?

Mr. HAWKINS.—Can't you cross-examine Mr. Collins; there is nothing more for him except the identification of the gun?

Mr. KEPNER.—I don't want to cross-examine him until the gun is here.

Mr. HAWKINS.—I will call Mr. Ed Neasham.

**Testimony of James Edward Neasham, for  
Defendant.**

Mr. JAMES EDWARD NEASHAM, called as a witness on behalf of the defendant, after being sworn, testified as follows:

(Testimony of James Edward Neasham.)

Direct Examination.

(By Mr. HAWKINS.)

Q. You are a son of Mr. Neasham, the deceased?

A. I am.

Q. Where do you live, Mr. Neasham?

A. Reno, Nevada.

Q. Where were you living February 26th and 27th, 1915?

A. At 607 North Virginia Street, Reno.

Q. Is that your father and mother's home?

A. It is. [94]

Q. And was at that time?      A. It was.

Q. Did you see your father, Mr. Neasham, after Friday morning of that day, until he was dead?

A. Friday morning?

Q. Yes.

Mr. KEPNER.—What day?

Mr. HAWKINS.—February 26th, the day before he was shot.      A. I saw him on Friday morning.

The COURT.—(Q.) You mean the last time you saw him was on Friday morning?

A. He didn't ask that, that is it, though.

Mr. HAWKINS.—(Q.) The last time you saw him alive was Friday morning, the day before he was shot on the following Saturday?      A. I believe so.

Q. Did he or not stay at home that night, Friday night?      A. I don't know.

Q. Did he or not come home Friday night?

A. I have no means of knowing that.

Q. You testified at the coroner's inquest, didn't you, Mr. Neasham?      A. I did.

(Testimony of James Edward Neasham.)

Q. I will ask you if at that inquest you were not asked the following questions, and make the following answers:

“Q. You say that you didn’t see Mr. Neasham after Friday morning?     A. No, Friday morning.

“Q. Didn’t he stay at home on Friday night?

“A. No, he didn’t come home that night.

“Q. Was your mother at home?     A. She was.”

Q. Were those questions asked you, and did you make those answers?     A. I did.

Mr. HAWKINS.—That is all.

Cross-examination.

Mr. KEPNER.—(Q.) Where were you on Friday, the 26th day of February, 1915?

A. I was attending classes at the University.

Q. Were you at home at all during the day on Friday?

A. I don’t remember whether I came home that noon or not.

Q. Where were you during Friday night?

A. Why, I had dinner at the Fraternity House, and in the evening went to a smoker given in the University [95] Gymnasium.

Q. What time did you go home that night, if you went home?

A. Some time between eleven and twelve.

Q. At night?     A. At night.

Q. Was the family up when you got home that night?     A. No.

Q. Was the house dark?     A. It was.

Q. What did you do after you got home?



(Testimony of James Edward Neasham.)

A. I retired.

Q. Where was your bedroom?      A. Upstairs.

Q. I understand you immediately retired to your bedroom after you entered the house between eleven and twelve o'clock Friday night?      A. I did.

Q. What time did you get up Saturday morning?

A. Ten-thirty.

Q. About ten-thirty Saturday morning, February 27th?      A. About ten-thirty.

Mr. KEPNER.—That is all.

**Testimony of Harry Hill, for Defendant.**

Mr. HARRY HILL, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination.

(By Mr. HAWKINS.)

Q. Mr. Hill, you live in Reno, Nevada?

A. Yes, sir.

Q. What official position do you hold, if any?

A. County Treasurer.

Q. How long have you been the County Treasurer of Washoe County?

A. Since the 4th day of January, 1915.

Q. As such County Treasurer has there come into your possession a revolver in the matter of the Neasham hearing?

A. Yes, sir, there was one delivered to me by the coroner of Reno township.

Q. Have you that revolver with you?

A. Yes, sir.

(Testimony of Harry Hill.)

Q. Will you produce it? (Witness produces revolver.)

Q. What, besides the revolver have you—in connection with the revolver?

A. Nothing at all except some of the shells.

Mr. KEPNER.—I can't hear you.

A. Shells.

Mr. HAWKINS.—(Q.) The magazine and shells?

A. Yes.

Q. How many loaded shells came into your possession with the pistol [96] from the coroner?

A. Eight loaded and one empty?

Q. And you have those now? A. I have.

Q. What is the number of that gun, if it has a number?

A. Well, I am sure I don't know, I never looked—thirty-two. I believe.

Q. Thirty-two caliber? A. Yes, sir.

Q. Has the gun a number on it? A. Yes, sir.

Q. And what is the number? A. 54589(r).

Q. And that is the gun and the shells that were delivered to you by the coroner? A. Yes, sir.

Q. When? A. On March 3, 1915.

Q. You have had it in your possession since that time? A. Yes, sir.

Mr. HAWKINS.—Take the witness.

Cross-examination.

Mr. KEPNER.—(Q.) Is this pistol in the same condition it was when you received it?

A. Yes, sir, as far as I know.

Mr. KEPNER.—That is all.

(Testimony of Frank Collins.)

Mr. HAWKINS.—I ask that the pistol, magazine and cartridges be marked Defendant's Exhibit Number 1.

(The pistol, magazine and cartridges are admitted in evidence, and marked Defendant's Exhibit No. 1.)

Mr. HAWKINS.—I would now like to recall Mr. Collins.

**Testimony of Frank Collins, for Defendant  
(Recalled).**

Mr. FRANK COLLINS, recalled by defendant for further examination, testified as follows:

Mr. HAWKINS.—(Q.) Mr. Collins, I hand you a pistol, admitted in evidence as Defendant's Exhibit Number One, and ask you to examine the same, and state whether or not that is the gun or pistol which you testified you sold to Mr. Neasham about six o'clock in the afternoon of February 26th, 1915, the day before he was found shot?     A. Yes, sir.

The COURT.—Is that all?

Mr. HAWKINS.—That is all, your Honor.

**Cross-examination.**

Mr. KEPNER.—(Q.) Take that pistol and show to the jury what you did when, as you stated in your direct examination, you showed Mr. Neasham how to work it. (Hands pistol to witness.) [97]

A. Well, Mr. Neasham didn't know anything about the pistol at all.

Q. Never mind that, Mr. Collins, just show the jury what you did.

A. Well, Mr. Neasham told me that he had never

(Testimony of Frank Collins.)

used an automatic gun in his life, and didn't know anything about it.

The COURT.—Don't state anything you are not asked. Counsel asked you to state what you did to explain the working to Mr. Neasham.

A. Well, I showed him how to load the gun.

Q. Well, show us; that is what he is asking you—just show us.

A. The first thing I showed him was how to load the magazine (illustrating by putting cartridges in magazine); then I showed him how to put the magazine in the pistol.

The COURT.—You need not bother about putting it all the way in.

A. Well, I showed him how to throw the first shell in the cylinder of the gun, just this way (illustrating); I showed him how to put the hammer on, and put the safety on when he shot it.

The COURT.—(Q.) That is, to put the safety on after he had shot it?

A. If he didn't want to use it, and didn't want to shoot.

Q. From the first explosion, until the safety goes on, it continues to explode successive cartridges, by merely putting your finger on the trigger?

A. No, we have to pull the trigger.

Q. You have to pull the trigger every time, but it does not need any further throw of shells in it?

A. No, sir, not after the first one; you just continue to pull the trigger.

Mr. KEPNER.—(Q.) What was the condition of



(Testimony of Frank Collins.)

the pistol when you delivered it to Mr. Neasham?

A. Loaded.

Q. What do you mean by that?

A. Why, loaded—there were nine shells in it.

Q. Where?

A. In the magazine, and one in the barrel.

The COURT.—(Q.) You threw one into the barrel, did you?

A. He did himself, after I showed him how.

Mr. KEPNER.—(Q.) Then when you handed the pistol to Mr. Neasham, there were nine shells in the magazine?

A. There was eight in the magazine, and one in the barrel.

Q. Just explain to the jury what Mr. Neasham did when he loaded it himself, as you stated?

A. What did he do with it? [98]

Q. Yes.

A. He loaded it, and put it in his pocket.

Q. What is that?

A. He loaded it, and put it in his pocket.

Q. Mr. Collins, you say when you gave the pistol to Mr. Neasham there was a cartridge in the barrel, and eight in the magazine? A. Yes.

Q. Now, what did Mr. Neasham do when he loaded the pistol?

A. He gave me the pistol back, and I unloaded it, and gave it back to see if he could load it.

Q. What time was this?

A. This was Friday afternoon, about six o'clock in the afternoon.

(Testimony of Frank Collins.)

Q. Where did you get the pistol?

A. I bought it; I got it on consignment.

Q. Now which?      A. I got it on consignment.

Q. From whom?      A. Matt Parrott.

Q. Matt Parrott of Reno?      A. Yes.

Q. What do you mean by "got it on consignment"?

A. He don't sell second-hand guns, and I take them from him and sell them, because he has no license.

Q. So Matt Parrott gave you this gun?

A. Yes.

Q. To sell for Matt Parrott?      A. Yes.

Q. When was that?

A. I could not tell you; I get guns from him all the time.

Q. How long before the 26th day of February, 1915, was it?

A. Might have been six months, and might have been a week.

Q. What is your best judgment?

A. I could not say.

Q. Was it three months?      A. I could not say.

The COURT.—(Q.) Did you have other weapons of the same kind?

A. Yes, I have all the time; I have a dozen now, I guess, in the store that belongs to him.

Mr. KEPNER.—(Q.) But you are positive you got this gun from Matt Parrott?      A. Yes.

Q. What is the number of this gun?

A. I don't know.

(Testimony of Frank Collins.)

Q. Did you ever know?      A. No, sir.

Q. Did you report the purchase of it?

A. I don't have to report the purchase of it—I didn't buy it.

The COURT.—(Q.) Does not the law require you to report the purchase [99] of arms you sell?

A. It does the purchase, but not when you get it upon consignment like that.

Q. Are you sure of that?      A. Yes, sir.

Mr. KEPNER.—(Q.) So you made no report of the gun when you acquired it from Matt Parrott?

A. No, sir.

Q. And you say the law does not require you to report it?      A. No, sir.

Q. And you didn't report the sale of it?

A. I don't have to report any sales.

Q. I was not asking you what you have to do, I am asking you if you did?

A. We don't report any sales.

Q. And you didn't report the sale of this particular gun?

A. No, sir, we don't report any sales.

Q. How long have you lived in Reno?

A. About twenty years.

Q. What has been your business?

A. Pawnbroker.

Q. During all that time?

A. No, sir, not all the time.

Q. What has been your business?

A. Cattle-raising—different enterprises.

Q. How long were you in the cattle business?

(Testimony of Frank Collins.)

A. Probably four or five years.

Q. Well, now, how long?

A. Four or five years.

Q. What four or five years was that?

A. Well, after 1902.

Q. After 1902?      A. Yes.

Q. You commenced the cattle business about 1902?

A. Yes.

Q. What had you done prior to that, Mr. Collins?

A. Steward in a hotel.

Q. What hotel?

A. Different ones—United States, all the way from San Francisco to New York.

Q. The United States Hotel?

A. Different ones; I was traveling steward for the Santa Fe Railroad Company, the Denver & Rio Grande, the Colorado & Southern.

Q. During the past twenty years?

A. Yes, sir, at different times.

Q. Then you haven't been continuously in Reno during the past twenty years?      A. No, sir.

Q. What part of the time have you been in Reno?

A. I have been in Reno now nine years steady.

[100]

Q. Nine years steady?      A. Yes, sir.

Q. What has been your occupation during those nine years?

A. Well, I said I was steward in a hotel, and in the pawnbroker business, and different business.

Q. How long were you steward in a hotel, and what hotel was it?



(Testimony of Frank Collins.)

A. Steward in the Mexico for two years, and steward for two years in the Thomas Cafe, and I was chef at the Riverside for a year.

Q. What year was that?      A. I don't remember.

Q. What year were you steward at the Thomas Cafe?      A. The last year.

Q. What year was that?      A. I don't remember.

The COURT.—(Q.) The last year you were in Reno, don't you live there yet?

A. The last year the Thomas Cafe was in Reno.

Mr. KEPNER.—(Q.) What year was it?

A. I don't remember.

Q. About what year?      A. I guess eight or nine.

Q. 1908 or 1909?      A. Yes, sir.

Q. And what year was it that you were steward at the Riverside Hotel?      A. 1901.

Q. To when?      A. I was there four months.

Q. And what year was it you were steward at this other hotel you speak of?

A. Mexico, 1903 and 1904.

Q. Where were you from 1904 to 1909?

A. In Reno.

Q. What were you doing?      A. Different things.

Q. What, for instance?      A. I can't remember.

Q. Haven't any idea at this time?      A. No, sir.

The COURT.—You certainly have some idea what you were doing.

A. I was working at different business; I was in the cigar stand work a year, in a jewelry store—different places.

The COURT.—You have some memory.      Counsel

(Testimony of Frank Collins.)

is entitled to ask these questions.

Mr. KEPNER.—(Q.) Is that the best answer you can give us as to what your occupation was from 1904 to 1909?

A. Yes; I worked a year for Ben Barbox there; worked a year for Woods and Company; worked at the Mexico Hotel; worked at Lochman & Mayer's.

Q. What year did you work for Lochman and Mayer?

A. Three years ago; I worked off and on there; I was sick for two years. [101]

Q. I am asking you to confine your answer to the time between 1904 and 1909.

A. I can't remember the places I worked in.

Q. What is your answer?

A. I say I can't remember exactly the places I worked in.

Q. You don't remember? A. No.

Q. And from 1909—that was the last year you worked for the Thomas Cafe? A. I believe it was.

Q. What did you do after you left the Thomas?

A. Went to work for I. S. Wood and Company.

Q. What was the business?

A. Pawnbrokers and jewelry store.

Q. How long did you work for I. S. Wood and Company? A. About a year and a half.

Q. That would bring you up to 1910?

A. I was sick for a year and a half, and didn't do anything.

Q. When were you sick?

A. Sick when I quit Wood.

(Testimony of Frank Collins.)

Q. What date was that?

A. 1911, I should judge.

Q. Do you remember the day of the month?

A. No, I don't.

Q. Do you remember positively the year you were taken sick?      A. I think it was 1910 or 1911.

Q. What was the nature of your sickness?

A. Sciatic rheumatism.

Q. You were sick how long?      A. Two years.

Q. Where were you during those two years?

A. In Reno and California.

Q. Whereabouts in Reno?

A. Where did I live?

Q. During the time you were sick?

A. I lived on Church Lane for about a year, and 541 West Third Street.

Q. Where on Church Lane?      A. Mr. Mayo's.

Q. What is his first name?

A. I could not tell you that.

Q. How long did you live with Mayo?

A. Pretty near a year.

Q. Then where did you go?

A. 541 West Third Street.

Q. You were still sick?

A. I was still sick when I first moved up there.

Q. How long continuously have you lived at 541 West Third Street?

A. It will be, I think it is three years in May.

Q. Three years this May?      A. Yes, sir. [102]

Q. How long were you in California?

A. Oh, probably three or four months.

(Testimony of Frank Collins.)

Q. During the time of your sickness?

A. Yes, sir.

The COURT.—(Q.) You say there is no regulation in this State requiring dealers in firearms to keep a memorandum of the number and the date of sale, and the person to whom sold?

A. No, sir; just when you buy the article; if you purchase a gun, or anything that way, you make a report every day.

Q. What do you mean by “make a report”?

A. Police report every morning of all purchases during the day, or loans; but there is no law requiring that you have a record of your sales, that is, to give to the chief of police.

Q. Then the arrangement you have with this man who has you sell his pistols, is an evasion of the law?

A. No, sir.

Mr. KEPNER.—(Q.) You say you receive pistols from Matt Parrott frequently? A. Yes.

Q. How many have you of Matt Parrott’s pistols at the present time? A. Three.

Q. Are they Savage automatic pistols?

A. No, sir.

Q. Who did you first talk to about this sale?

A. Thornton Read.

Q. When was that?

A. The day after, I think, of the day it happened.

The COURT.—(Q.) The day after you sold it, or that the death of Mr. Neasham occurred?

A. I think it was a day or two after Mr. Neasham had died.



(Testimony of Frank Collins.)

Mr. KEPNER.—(Q.) Was it the day after the inquest?

A. I don't remember; I didn't know anything about the inquest; I wasn't subpoenaed on the inquest at all.

Q. Was it Sunday morning, Tuesday, or what day of the week was it?      A. I could not say, I forget.

Q. What day of the week was it that you sold the pistol?      A. On Friday, I think it was.

Q. Who did you talk to about this case?

A. Who did I talk to?

Q. Yes.      A. Thornton Read.

Q. Who else did you talk to?

A. That is about all.

Q. That is about all?

A. At the time, you mean? [103]

Q. At any time?

A. Oh, I don't know; I have talked to lots of people about it, the same as anybody else would that reads it in the paper—I have talked to the sheriff about it.

Q. When did you talk to the sheriff about it?

A. Oh, several days afterwards, I guess.

Q. How recently did you talk to the sheriff about it?      A. Day before yesterday.

Q. Who else have you talked to about it within the last few days?      A. Kirby Unsworth.

Q. Who else?

A. I don't know; I may have talked to a dozen people about it.

Q. Who?      A. My partner.

(Testimony of Frank Collins.)

Q. Well, who else?

A. Well, I can't remember everybody I speak to in a day; there was no secret connected with it, I didn't make any secret of it.

Q. Any what?

A. Any secret of it; I talked to anybody who spoke to me about it.

Q. Talked to anybody about it?

A. Why, certainly; talked to Mr. Burke to-day about it.

Q. To-day?      A. Yes.

Q. How did you happen to talk to Kirby Unsworth about it?      A. How is that?

(The reporter reads the question.)

A. Why, we came up on the train together—we were both subpoenaed on the case.

Q. How is that?

A. We came up on the train together—we were both subpoenaed on the case.

Q. Day before yesterday?      A. To-day.

Q. Well, you said you talked to him day before yesterday?

A. I did not; I didn't see him the day before yesterday.

The COURT.—(Q.) I understood you to say you had talked to him the day before yesterday.

A. I didn't see him, your Honor, day before yesterday.

Mr. KEPNER.—(Q.) Then you didn't talk to Kirby Unsworth day before yesterday?

A. No, sir, I didn't see him.

(Testimony of Frank Collins.)

Q. You did talk to him coming up on the train from Reno? A. Yes. [104]

Q. When was that? A. This morning.

Q. This morning? A. Yes.

Q. Prior to this morning when did you talk to Kirby Unsworth about this case?

A. I don't think I ever spoke to him.

Q. Who did you talk to within the last three days?

A. Well, my partner; Mr. Burke—I was just speaking to him over there just now.

Q. Now, I will ask you if it is not a fact that within the last two days you went to the county treasurer's office in Reno, and examined this pistol with Kirby Unsworth? A. With Kirby Unsworth?

Q. Yes. A. No.

Q. Did you go to the county treasurer's office at all? A. I did.

Q. Who was with you? A. The attorney.

Q. Who?

A. I forget the gentleman's name there.

Q. This gentleman here (indicating)? A. Yes.

Q. When was that? A. Yesterday.

Q. Who did you meet there?

A. Harry Hill and Dan Dunkle, and Mrs. Hill.

Q. And Kirby Unsworth?

A. I don't remember seeing Kirby there.

Q. You don't remember seeing Kirby? A. No.

Q. What was the subject of your conversation there at the treasurer's office, with reference to this pistol?

(Testimony of Frank Collins.)

A. There was no conversation to it; I examined the pistol.

Q. Examined the pistol; Kirby Unsworth wasn't there?

A. He wasn't there; I don't remember of seeing him if he was there.

Q. You didn't talk to him on that occasion?

A. No, sir.

Mr. KEPNER.—That is all.

Redirect Examination.

Mr. HAWKINS.—(Q.) You said in answer to one question that you didn't know the number of this gun; will you state by what means, if any, you are able to identify this gun as being the gun which you sold to Mr. Neasham, as you have testified?

A. Yes, sir.

Q. State what it is?

A. The gun is marked here with a steel punch on the top of the magazine.

The COURT.—(Q.) Is the gun itself marked, or just the magazine? A. Just the magazine. [105]

Q. Do you mean that magazine could not fit any other gun of the same caliber?

A. It would fit any gun.

Q. How do you identify the gun, then?

A. I can't identify the gun only by remembering it; but the magazine is marked.

Mr. HAWKINS.—(Q.) How did that mark on the magazine come there?

A. I put it there with a steel punch.

The COURT.—(Q.) Before you sold it?



(Testimony of Frank Collins.)

A. Yes, sir.

Mr. HAWKINS.—That is all.

Recross-examination.

Mr. KEPNER.—(Q.) Where is the steel punch mark on the magazine?

A. Right here (indicating).

Q. Right where?

A. Right on here (indicating).

Q. Just show it to the jury—show that steel punch mark to the jury.

(Witness indicates the mark to the jury.)

Q. You put that mark there before you sold the pistol?      A. Yes, sir.

Q. How many Savage automatic pistols have you sold?      A. Probably a hundred in the last year.

Q. You mark them all with that same steel punch mark?      A. Yes.

Q. In that same place?      A. Yes.

Mr. KEPNER.—That is all.

Mr. HAWKINS.—Just a minute, Mr. Collins. (Q.) Is there anything else about the gun or the magazine—

The COURT.—I cannot allow you to go back over that question. You have approached him twice on that, and he stated exactly how he came to remember this pistol, and we cannot go over the same ground.

Mr. HAWKINS.—He had not finished when counsel took him this last time.

The COURT.—No; this is merely in cross-examination of your direct. Is that all with the witness?

Mr. KEPNER.—That is all, your Honor.

(Testimony of Frank Collins.)

Mr. HAWKINS.—I wanted to ask him some questions.

The COURT.—You may ask him anything that does not trench upon what I have ruled.

Mr. HAWKINS.—(Q.) I will ask this question: State whether or not the magazine of that gun is perfect, or defective in any way? [106]

Mr. KEPNER.—Objected to as calling for the conclusion of the witness, and it is not redirect examination.

The COURT.—It is not redirect examination, no; but still there is no particular harm in that. The witness has shown a familiarity with these weapons to an extent of dealing in them, that justifies letting his statement go before the jury as to whether the magazine is in normal condition, or is defective. Is there any defect in the magazine, he asked you?

A. The magazine was very tight to put the shells in, and I took a pair of pliers and opened it up a little, so the shells would go in easier.

The COURT.—You would not call that a defect; I suppose that is merely a lack of ready action or movement.

A. It would be alright for anybody that understands how to handle a gun, but a man not experienced in getting the shells in, it would be very hard for him, so I took a pair of pliers and opened it, so the shells would go in more readily.

Mr. HAWKINS.—That is all.

(The Court admonishes the jury, and at 4:30 P. M. an adjournment is taken, until Thursday, March 9, 1916, at 10 o'clock A. M.)

Thursday, March 9th, 1916.

Court convened 10 o'clock A. M.

(All parties present.)

**Testimony of Thornton A. Read, for Defendant.**

Mr. THORNTON A. READ, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination.

(By Mr. HAWKINS.)

Q. Your name is Thornton A. Read?

A. It is; yes, sir.

Q. You live in Reno, Nevada?      A. I do.

Q. And have for a great many years?

A. Yes, sir.

Q. Where were you living in February and March, 1915?      A. Reno, Nevada.

Q. What was your business or occupation during those months?

A. Clerk of the police department of Reno, Nevada.

Q. How long had you been so employed?

A. Since the 4th day of January, 1915. [107]

Q. Are you so employed to-day?      A. I am, sir.

Q. Prior to that time what was your business?

A. I was constable for Reno township.

Q. For what length of time were you constable?

A. Two years.

Q. Do you recall the time that Mr. Neasham was found dead out east of Reno?      A. I do.

Q. As an officer of the police department did you or not make any investigation to ascertain where the

(Testimony of Thornton A. Read.)

gun came from that was found by his side?

A. I did.

Q. State what you did in reference to that matter.

A. By direction of the chief I was detailed—

Q. Chief of police?

A. Chief of police, yes, sir—I was detailed to find out, if possible, where the revolver which he had in his possession at that time, or pistol, I should say, had been purchased.

Mr. KEPNER.—I move that be stricken out, “the revolver he had in his possession.”

Mr. HAWKINS.—I agree to it.

The COURT.—Yes, that will go out. Just answer the question.

A. I was directed to locate, if possible, where Mr. Neasham had purchased a pistol.

Mr. KEPNER.—I object to that, if the Court please.

The COURT.—That is merely stating what he was directed to do; there is no harm in that; that does not prove that Mr. Neasham bought a pistol; he is just telling what he was directed by his superior to do.

Mr. HAWKINS.—Go ahead.

A. I made investigation of several—

The COURT.—Don't make general statements of that kind. As to whether it was an investigation or not the jury will find; state what you did.

A. I entered the store of Butcher and Collins on Virginia Street and questioned Mr. Collins as to



(Testimony of Thornton A. Read.)

whether or not he had sold a thirty-two automatic Savage pistol.

The COURT.—Now, of course you understand anything Mr. Collins told him is not evidence; he is permitted to state what he did, but he cannot state what he was told. [108]

Mr. HAWKINS.—(Q.) Did you or not secure information at that time concerning this Savage thirty-two automatic?

Mr. KEPNER.—That is objected to under the ruling of the Court.

The COURT.—No, that is perfectly proper; he is stating simply the result of what he did; he is not permitted to state what the information was, or to state what was told him, that is hearsay; he is simply asked to state a fact as to what he did.

Mr. KEPNER.—If he confines himself to that kind of a statement, I have no objection.

The COURT.—Well, he has thus far.

(By direction the reporter reads the question.)

A. I did.

Mr. HAWKINS.—(Q.) Was or not that information to the effect that Mr. Neasham had purchased a thirty-two automatic Savage gun?

Mr. KEPNER.—I think that is objectionable, if the Court please?

The COURT.—Well, do you object?

Mr. KEPNER.—I object on the ground it is leading, and on the further ground that the answer to it would be clearly hearsay.

The COURT.—The objection is sustained.

(Testimony of Thornton A. Read.)

Mr. HAWKINS.—(Q.) In your investigation did you ascertain what you were told to ascertain, namely, whether or not Mr. Neasham had purchased a thirty-two automatic, which was found by him?

Mr. KEPNER.—Same objection.

The COURT.—Same ruling. You can't prove a fact that way.

Mr. HAWKINS.—(Q.) Were you able to find out where this gun or pistol that was found by Mr. Neasham's side was purchased by him?

Mr. KEPNER.—That is objected to for the same reason, and for the further reason that the question is indefinite and uncertain.

The COURT.—Well, it is objectionable upon the first ground. The objection will be sustained.

Mr. HAWKINS.—May I have the benefit of an exception to that ruling, your Honor?

The COURT.—Oh, certainly, you are entitled to an exception to any ruling.

Mr. HAWKINS.—That is all.

Mr. KEPNER.—That is all. [109]

**Testimony of Mrs. Matilda C. Neasham, for Defendant.**

Mrs. MATILDA C. NEASHAM, the plaintiff, called as a witness on behalf of the defendant, testified as follows:

**Direct Examination.**

(By Mr. HAWKINS.)

Q. You have already been sworn in this case, have you, Mrs. Neasham?      A. Yes.

Q. You are the plaintiff in this case?      A. I am.

(Testimony of Mrs. Matilda Neasham.)

Q. Is or not the estate of your deceased husband being administered in the District Court of Washoe County, Nevada?      A. It is.

Q. You are the administratrix of that estate?

A. I am.

Q. When did you last see your husband before you saw him after he was dead?

A. Just about eight-thirty on the morning of February 27th, 1915.

Q. About eight-thirty on the morning of February 27th, 1915?      A. Yes, sir.

Q. And when did you see him just last prior to that time?      A. That was the last time I saw him.

The COURT.—He is asking you, Mrs. Neasham, when was the time next previous to that that you had last seen him.

A. Well, he was with us all morning, had breakfast with us, dressed the baby, and helped as usual.

Mr. HAWKINS.—(Q.) That was Saturday morning?      A. Yes.

Q. Now, what I am asking, prior to Saturday morning when was the last time you saw him?

A. On Friday evening.

Q. What time Friday?

A. About six o'clock, I guess.

Q. Did he or did he not stay at home Friday night before Saturday?

A. I do not know; he was there when I got up in the morning, but whether he slept upstairs or not I don't know.

Mr. HAWKINS.—That is all. [110]

**Testimony of C. P. Ferrell, for Defendant.**

Mr. C. P. FERRELL, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination.

(By Mr. HAWKINS.)

Q. Mr. Ferrell, you are at present sheriff of Washoe County, Nevada?     A. I am.

Q. How long have you been sheriff of Washoe County?     A. Since January 1st, 1915.

Q. Prior to that time were you sheriff of Washoe County, Nevada?

A. Two years I was out, and eight years prior to that time, I was.

Q. Altogether how long have you served as sheriff of Washoe County?

A. Something over nine years.

Q. Do you recall the time that Mr. Neasham, mentioned in this record, was found dead or dying out east of Reno?     A. I do.

Q. Do you recall who first notified you in regard to the matter?     A. I could not speak their name.

Q. Did you go to the place east of Reno where Mr. Neasham's body was?     A. I did.

Q. Who went with you?

A. Judge Unsworth; I would not be sure whether the undertaker went or not; I think not, as he came afterwards, arrived shortly afterwards; he might have went with us; I have forgotten.

Q. Where did you go, and what place did you find the body?



(Testimony of C. P. Ferrell.)

A. I judge it was close to a mile east of Reno, between Reno, what they call Coney Island, and to the spur track—off of the spur track of the Southern Pacific, where a cut runs down through where there is an oil-tank dug down deep, so the wagons can come in and load oil into the wagon.

Q. Where was it in reference to the Asylum grounds?

A. West of the Asylum grounds; it is on part of the Asylum ground—I think the Asylum owns that ground.

Q. What did you find when you arrived at this place?

A. We found a body lying in the cut, just opposite, on the north side of the bank from the oil tank, or oil pipe.

Q. Whose body?      A. William Neasham.

Q. State the position the body was in when you arrived there?

A. The body was lying on the right side, with the right arm—lying on [111] the right arm, the left arm lying slightly across the hips, and one of the limbs or legs slightly drawn, the other one extending straight, I don't know which one it was; the body lying the full length.

Q. Describe the size and condition of that cut in which you found the body.

A. The cut at the deepest point I should judge was about fourteen feet deep on the south bank of the cut; on the north bank of the cut it inclined a

(Testimony of C. P. Ferrell.)

little upwards, it was possibly a little less; then it tapers off to about a hundred yards, or a hundred and fifty yards, where it slopes up, to come up on a level with the ground.

Q. What was the character of the soil?

A. The soil is of a sandy nature, that is, on the bottom; the sides were rocky.

The COURT.—(Q.) The head was lying up the slope, you say?

A. Yes, sir.

Mr. HAWKINS.—(Q.) State, if you know, whether or not the ground was moist or dry at that time?

A. The top surface of the ground would be dry just after a thaw and freeze, or a freeze and a thaw.

Mr. KEPNER.—I object to that.

The COURT.—I don't see any objection to that; it is a description of the character of the soil.

Mr. HAWKINS.—(Q.) When you arrived at the scene, Sheriff, what did you do, and what did you find? State fully.

A. We came on the bank directly over the body, then turning westerly, walked around to where this grade comes down into the cut; we walked down in the cut to the body, and I picked up the pistol, and handed it to Mr. Unsworth; Mr. Unsworth looked at it a moment, and handed it back to me, and then we commenced viewing the body.

The COURT.—The witness had not mentioned the pistol before, had he?

Mr. KEPNER.—This witness had not.

(Testimony of C. P. Ferrell.)

The COURT.—(Q.) Was there a pistol lying there? A. There was.

Q. Lying near the body?

A. About eight inches of his right hand.

Mr. KEPNER.—What was that answer?

A. About eight inches of his right hand.

Mr. HAWKINS.—I would like to break the continuity of this examination [112] just for a moment to get some photographs in.

Q. Were you present on the ground when some photographs were taken? A. I was.

Q. I hand you a photograph, which I will ask to be marked for identification Defendant's Exhibit No. 2; and also another one which I will ask to be marked for identification Defendant's Exhibit No. 3.

(The photographs are marked Defendant's Exhibits Nos. 2 and 3, for identification.)

Q. Examine these two photographs, Mr. Ferrell, and state if those were the ones that were taken in your presence at the time referred to. (Hands photographs to witness.) A. They were.

Q. Do they correctly represent the ground at the time they were taken? A. Yes, sir.

The COURT.—(Q.) When were they taken?

A. In three or four days after finding the body.

Q. Oh, they were not taken at the time?

A. No.

Q. They simply represent the scene where the body was found? A. That was it.

Mr. HAWKINS.—(Q.) Two or three weeks?

The COURT.—Two or three days, he says.

(Testimony of C. P. Ferrell.)

WITNESS.—Three or four days.

Mr. HAWKINS.—(Q) State whether or not the view shown on those photographs represents the condition of things at the time the body was found there, with the exception of the individual being in the pictures.

A. Yes, sir, it does.

The COURT.—(Q.) There had been no physical change between the time you found the body and the time these photographs were taken?

A. No, the only change would be the tracks leading down, where people came down; the ground was the same.

Mr. HAWKINS.—(Q.) I call your attention to a photograph marked Defendant's Exhibit Number 2 for identification; what is the direction that is shown in that photograph?

A. This shows the direction of the cut running east and west.

Q. Where was the camera in reference to taking that picture east and [113] west from the place?

A. West.

The COURT.—(Q.) The top of that picture would be north, would it?

A. This bank would be north; the top of the picture would be east.

Q. Oh, the top of the picture would be east?

A. The top of the picture would be east.

Q. That road shown there, then, that traveled way, runs east and west? A. East and west.

Q. The high bank would be north, and the other



(Testimony of C. P. Ferrell.)

side south? A. Yes, sir.

Mr. KEPNER.—(Q.) Are not you mistaken, Sheriff; isn't it just the other way? A. No, sir.

The COURT.—(Q.) The figure of a man that is in that picture, where is that.

A. There is a man sitting at the spot where the body was found.

Q. The spot where you found the body on the ground is represented by the figure of the man who sits there?

A. Where he is sitting, yes, sir.

Mr. HAWKINS.—(Q.) I call your attention to Defendant's Exhibit Number 3 for identification; what is the direction on that picture as to the course of the road through the cut?

A. That is east and west, the same as the other. The gentleman is standing on the bank directly above where the body was found, just opposite the switch of the Southern Pacific track.

Q. In which direction is the gentleman standing as shown in this picture, from where the body was found down in the cut?

A. North; the body was lying south of the gentleman on the bank, in the cut.

The COURT.—(Q.) The railroad runs along the top of this high bank? A. Yes, sir.

Mr. HAWKINS.—(Q.) What is the railroad track shown in Defendant's Exhibit Number 3 for identification, nearest to the cut, the main line, or a switch or spur? A. It is a switch.

Mr. HAWKINS.—We offer the two photographs

(Testimony of C. P. Ferrell.)

marked Defendant's Exhibits Numbers 2 and 3 for identification, and ask that they be admitted in evidence as Defendant's Exhibits Number 2 and Number 3, respectively. [114]

Mr. KEPNER.—No objection.

(The photographs are admitted in evidence, and marked Defendant's Exhibits No. 1 and No. 2, respectively, and shown to the jury.)

Mr. HAWKINS.—(Q.) You said that you found a pistol within a few inches of the right hand of the deceased when you went there; what kind of a pistol was it?

A. I think they call them a Savage automatic.

Q. What caliber? A. Thirty-two.

Q. Did you take a record of the number of the pistol? A. I did.

The COURT.—(Q.) At the time?

A. No, sir, later; about a half hour afterwards.

Q. Before it left your possession? A. Yes, sir.

Mr. HAWKINS.—(Q.) I hand you a pistol, Defendant's Exhibit No. 1, in evidence, and ask you to examine the same, and state whether or not that is the pistol that you found at the time by the side of the body of Mr. Neasham.

A. Yes, sir, that is the pistol.

Q. State the condition the pistol was in when you picked it up from the side of the body of the deceased?

A. The pistol was lying the muzzle sloping downward, on a downward slope, where it had slid out of the hand.

(Testimony of C. P. Ferrell.)

Mr. KEPNER.—I object to that.

The COURT.—Leave out anything of that kind, Mr. Sheriff; that is for the jury to find, not for you to state, whether it was in his hand; you don't know it was in his hand.

WITNESS.—I didn't mean it that way—lying muzzle downward, with the sand or soft dirt in the muzzle of the barrel, and about eight inches from the hand.

The COURT.—(Q.) The right hand, I understood you to say, was lying under the body?

A. Lying under the body, and kind of this way (illustrating), on the right side, kind of with the hand upward.

Q. And the other lying across his hip?

A. Slightly; slightly across his left hip.

Mr. HAWKINS.—(Q.) State the condition of the pistol, whether it was cocked, or what?

Mr. KEPNER.—I object to that. This witness is an intelligent witness, and when he is asked to describe the condition of the gun, I [115] submit he can do it without any prompting from counsel.

The COURT.—Refrain from making suggestions to your witness, it always detracts from the value of testimony, either to have it brought out by leading questions, or the subject matter suggested.

Mr. HAWKINS.—(Q.) Go ahead, Sheriff, and state all about the condition of that pistol at the time you picked it up.

A. The hammer was back, and a loaded cartridge in the magazine,—in the chamber; the magazine con-

(Testimony of C. P. Ferrell.)

tained shells, but I didn't take them out at that time, not until afterwards, when I removed the magazine.

Q. What did you do with the gun after it was handed back to you, as you testified a moment ago, by Mr. Unsworth?

A. I locked it in my safe in the office.

Q. What did you finally do with it?

A. At the coroner's inquest I delivered it to Judge Unsworth.

Q. He was the justice of the peace and *ex-officio* coroner of Reno township? A. Yes, sir.

Q. State the condition of the gun at the time you delivered it to the coroner at the time mentioned, as compared with the condition of it as the time you picked it up by the body?

A. The gun was practically in the same condition, minus the dirt in the barrel, that had dropped out in the muzzle of the barrel; I had removed the loaded shell in the barrel, and taken the magazine out of the gun.

Q. On the ground when you went out there first, could you or not see tracks that had been made, if any had been made?

Mr. KEPNER.—I object to that as leading.

The COURT.—Don't suggest the subject matter that you want him to testify to, it always leads to objection.

Mr. HAWKINS.—I didn't intend to lead the witness; I was just trying to get directly at the point.

The COURT.—I understand that; but a suggestive question is just as objectionable as a leading



(Testimony of C. P. Ferrell.)

question. The witness is an officer of years' experience, and my observation teaches me that they are close observers of things of that kind; he can tell you all about the situation and surroundings there without leading him or suggesting to him.

Mr. HAWKINS.—(Q.) Did you at the time make investigations of the [116] ground surrounding the body?      A. I did.

Q. Now state fully what observations you made concerning the ground, the nature of it, the appearance of things, and what you saw.

WITNESS.—Your Honor, in making that answer I will have to draw a comparison, and explain.

The COURT.—Well, now, Mr. Sheriff, just answer the question, and if there is anything you think should be suggested, if it is not suggested by counsel, it is not for witnesses to volunteer.

WITNESS.—I did not mean to suggest it, merely to explain what was leading up to it.

The COURT.—That will come out naturally.

WITNESS.—Arriving at the scene, I found three tracks leading down to where the body was lying; one track leading to the spot, two other tracks leading to within about eight or ten feet of the spot. Those tracks turned and went back, making altogether five lines of tracks, three going and two returning.

The COURT.—When you speak of tracks, it is understood you are referring to human footprints.

WITNESS.—I examined the north bank of the cut to see if any human tracks had come down there;

(Testimony of C. P. Ferrell.)

seeing none, I examined the south bank, and found none there; I examined for a number of feet around the body, possibly fifteen or twenty feet; I saw no other tracks other than what I mentioned.

Mr. HAWKINS.—(Q.) Did you or not examine the clothing on the body at that time?

A. I did not.

Q. What, if anything, did you observe on the body?

The COURT.—You mean wearing apparel?

Mr. HAWKINS.—Yes. (Q.) What did he have on that you noticed?

A. Wearing apparel?

Q. Yes.

The COURT.—(Q.) What did the body have on?

A. Just his clothing.

Q. Well, there are different articles of clothing. In a general way, how was he dressed; he had a pair of trousers on, I suppose? [117]

A. Trousers, and what I would call a sack suit—I didn't pay much attention.

Q. Dressed in the usual way? A. Yes.

Mr. HAWKINS.—(Q.) Did you observe any injuries on the body, if so, state what? A. I did.

Q. Where were they, and what?

A. What, about the injuries?

Q. Yes.

A. I found an injury through the mouth in the back part—in the head.

Q. Did you see any other injuries on him?

A. I didn't find any other.

Q. Can you state the nature of that injury that

(Testimony of C. P. Ferrell.)

you refer to through the mouth?

A. You mean what had caused it?

Q. Yes.

The COURT.—And its nature, I suppose whether it was a cut, or a hole, or what.

Mr. KEPNER.—I don't think the witness is competent to express an opinion.

The COURT.—Any man with experience of long years standing as sheriff, and who has had acquaintance with knife wounds or gunshot wounds is competent to give his judgment as to what the nature of the wound was. It has been frequently held that men who were not officers, but whose lives had been spent on the frontier under conditions which brought them in contact with matters of that kind, may be asked to state what in their judgment caused a certain injury.

Mr. KEPNER.—After it has been shown they had had experience.

The COURT.—This man has been sheriff.

Mr. KEPNER.—That does not qualify him as an expert on wounds.

The COURT.—It justifies the Court in permitting his evidence to go to the jury—a man who has been sheriff, especially in a country like Nevada, or California, or any of these States, for a period of eight years.

Mr. KEPNER.—I accept the judgment of the Court.

The COURT.—He asks you to describe the nature

(Testimony of C. P. Ferrell.)

of this injury, and what its appearance was.

WITNESS.—The injury, I would describe it as a blow-out from concussion. [118]

Q. You are speaking now of the external injury.

A. There was none outside; it was through the mouth, but toward the back of the head, like concussion, tearing quite a large hole, and carrying everything in front of it, caused by the explosion of the shell fired from the gun.

Mr. KEPNER.—I object to the cause of it.

The COURT.—Yes, he has not asked you anything except to describe the nature of the wound, and whether it in appearance was made by knife or gunshot, or by some other means. I think the witness' answer, though, is proper.

Mr. KEPNER.—I think the latter part of that answer should be stricken out—caused by concussion.

The COURT.—No, I think not; I think it is competent.

(By direction the reporter reads the answer.)

The COURT.—(Q.) This wound had no exit, no mouth coming out?

A. No, there might have been possibly a small place through there, but I didn't notice it at the time.

The COURT.—Well, of course it is a matter of common knowledge and observation that a bullet always makes a larger hole coming out than it does going in.

WITNESS.—This was all puffed out in the back, carried everything to the back, and puffed it out, but whether it broke through or not, I hardly think it



(Testimony of C. P. Ferrell.)

did; I could not tell at that time.

Mr. HAWKINS.—(Q.) From your experience as an officer, and observation of this wound which you have described, can you state how far the muzzle of the gun was from the point of entrance when the shot was fired?

Mr. KEPNER.—I object to that as purely the opinion of an expert.

The COURT.—That is clearly objectionable, because it would depend upon circumstances that this witness could not possibly know; it is not the subject of expert testimony at all.

Mr. HAWKINS.—Will your Honor bear with me just a moment?

The COURT.—Yes.

(Counsel for defendant discusses the admissibility of the question.)

The COURT.—I will give you an exception; it is incompetent to my mind, and not the subject of expert testimony. [119]

Mr. HAWKINS.—Very well, I will ask a question.

The COURT.—You have asked it, and I have ruled on it.

Mr. HAWKINS.—I would like to put it in another form.

The COURT.—Very well.

Mr. HAWKINS.—(Q.) From your experience as an officer, are you able to state the distance that a shot fired from this pistol, Defendant's Exhibit One, would make a hole larger than the bullet fired from that gun?

(Testimony of C. P. Ferrell.)

Mr. KEPNER.—If your Honor please, in addition to the objection suggested by your Honor, I make the further objection that the question assumes a fact which is not in evidence; there is absolutely no evidence that the deceased came to his death from a thirty-two caliber automatic cartridge, fired from a pistol which has been identified, and the question assumes that fact.

The COURT.—Well, the objection does not add anything to the first objection, that it is incompetent. The question is excluded as being incompetent.

Mr. HAWKINS.—To which your Honor will give us an exception.

The COURT.—Yes. Is that all of the witness?

Mr. HAWKINS.—That is all, your Honor.

Cross-examination.

Mr. KEPNER.—(Q.) Calling your attention to Defendant's Exhibit Number 2, I understood you to say that the high side of the bank was on the north side of the cut?

A. Let me see the photograph. (Exhibit is handed to the witness.)

A. Now what was your question?

(The reporter reads the question.)

A. No, sir.

The COURT.—Sheriff, you did so state, that this bank represented the north.

A. This was the north, but I said the high bank was on the south, that the bank was the deepest on the south, and sloped toward the north.

(Testimony of C. P. Ferrell.)

The COURT.—Well, I didn't understand you in that way.

Mr. KEPNER.—I didn't either.

Q. Then the high side of the bank, as shown by this photograph, is on the south side of the cut? [120]

A. At the tank; I think if you will look at it, you will see at the deepest, where the oil tank is there on the south bank.

Q. And this tank represents the position of the outlet of the tank you speak of?

A. Yes, and that was the deepest point, I think the testimony will show I said that was the deepest point.

Q. That is on the south side of the cut?

A. That is on the south side of the cut.

Q. What time of day was it, Mr. Ferrel, that you first arrived at this cut on the 27th day of February, 1915?

A. Between the hours of ten and twelve o'clock.

Q. Now can you fix the time any more definitely than that?

A. Well, I will have to say then, eleven o'clock; but it was after court was called, I know, and I got back before noon.

Q. Now as a matter of fact, wasn't it ten o'clock when you arrived at the cut?

A. No, I should say between ten and twelve.

Q. You should say it was what?

A. Between ten o'clock and twelve o'clock.

Q. Between ten and twelve?      A. Yes.

Q. Now I would like to have your best judgment

(Testimony of C. P. Ferrell.)

as to the actual time that you arrived there?

A. Well, I would say it was between—I was back before twelve o'clock from the scene.

The COURT.—Well, he is asking you about what time you arrived there?

A. Why I should say—I don't know, I would not say exactly—I would say then between ten and eleven o'clock, because I was back before twelve.

Mr. KEPNER.—(Q.) That is your best judgment? A. Yes, sir.

Q. As to the time you arrived at this cut?

A. Yes.

The COURT.—(Q.) That was in the forenoon, Mr. Sheriff? A. Yes, in the forenoon.

Mr. KEPNER.—(Q.) By the expression "this cut" we both refer to Defendant's Exhibit number two—that is what you are referring to, isn't it?

A. I am referring to the cut.

Q. The COURT.—That is the only cut that has been spoken of here.

Mr. KEPNER.—(Q.) Did you testify at the coroner's inquest in Reno on the occasion when you say you delivered this gun to Mr. Unsworth? [121]

A. I did.

Q. And you were asked about this gun at that time? A. I was.

Q. I will get you to state whether you were asked this question by the district attorney: "Q. Did you take the gun?" to which you answered "Yes, sir, I picked the gun up." A. I did.

Q. Then you produced the gun; and then you were



(Testimony of C. P. Ferrell.)

asked this question, referring to this same pistol: "Is this in the same conditon as it was?" to which you answered, "No, I removed the shell from the chamber, and there are nine shells in the magazine."

A. Well, you are getting two questions together.

Q. The question and your answer. The question: "Is this in the same condition as it was?" to which you answered: "No, I removed the shell from the chamber, and there are nine shells in the magazine." Did you so testify?

A. It is compounded in two questions.

The COURT.—No, he is reading to you what occurred at the coroner's inquest. He is simply asking you if you gave that answer at the coroner's inquest. Read it to him again.

Mr. KEPNER.—(Reading:) "Is this in the same condition as it was?" "A. No, I removed the shell from the chamber, and there are nine shells in the magazine."

Q. Did you so testify?

A. I made that answer to two questions.

Q. Now the question was repeated: "Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber, and there is nine in the magazine." Did you so testify?

A. No, sir, I did not. I will explain my testimony.

The COURT.—No, he is just asking you about this testimony.

WITNESS.—They got the answers to the questions mixed.

(Testimony of C. P. Ferrell.)

Mr. KEPNER.—(Q.) What is that?

A. They have got the answers to the questions mixed, that is all.

The COURT.—Did you state in substance then, Mr. Sheriff, at that inquest, that you had removed the shell from the chamber, and that there were nine shells in the magazine?

A. No. The magazine won't hold nine shells.

Q. You have stated it twice there. [122]

A. I never saw that testimony—I haven't seen what this lady has written down.

Mr. KEPNER.—Well, I suppose this lady would take correctly what you testify.

A. I suppose that, too, but I didn't see it.

The COURT.—That is an immaterial digression.

Mr. KEPNER.—(Q.) Now did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger? A. I did not.

The COURT.—(Q.) What is meant with an instrument like that that “the safety is on the trigger”?

A. If the safety is on it is an impossibility to discharge the gun by pulling the trigger.

Q. That is, if the safety is on the trigger?

A. Yes, then it is caught; when the safety is released then you are at liberty to—

Q. Then there is danger?

A. Then there is danger.

Mr. KEPNER.—(Q.) Who have you talked to about this case, Sheriff?

A. Oh, I don't know how many; I have talked with a great many.

(Testimony of C. P. Ferrell.)

Q. You have talked with a great many; how frequently have you talked about this case?

A. Well, not in the last month or so, I have not talked much; but prior to that time it was pretty near every day that somebody would ask me in regard to it.

Q. Who were they?

A. Oh, I don't remember, promiscuously, as I would meet people on the street; some hadn't heard it; and some were not here, and were asking me about it.

Q. And that series of conversations that you have had with people about this case has covered the time that has intervened since the 27th of February, 1915, up to about a month ago?

A. The conversations subsequent to that time?

Q. The series of conversations.

The COURT.—No. You say you have talked with a great many people since this occurred, and he asks you if those conversations have covered the entire period between February, 1915, to about a month ago.

A. Well, I hardly understand his question, covering the entire period.

The COURT.—(Q.) Well, have they been interspersed throughout that period? You ought to be able to understand that. [123]

A. Yes, at odd times people would ask me questions about it, get to talking about it.

Mr. KEPNER.—(Q.) At different times since February, 1915, and frequently you have talked with

(Testimony of C. P. Ferrell.)

people about this case?

A. Yes, in the office and on the street we were talking.

Mr. KEPNER.—That is all.

Redirect Examination.

Mr. HAWKINS.—(Q.) You were asked about the gun or the pistol, when you picked it up, and questions were read to you, using the word “shell,” and the answer in which you said that you removed the shell from the chamber? A. I did.

Q. Was that a loaded or an empty shell?

A. It was loaded.

Q. Was or not the gun in position to shoot when you picked it up? A. It was.

Q. What would have been necessary to have fired a shot from the gun when you picked it up?

A. Pull the trigger.

Mr. HAWKINS.—That is all.

Recross-examination.

Mr. HEPNER.—(Q.) Now at the coroner’s inquest after testifying that you had removed the shell from the chamber, were you asked this question: “Q. You have the empty cartridge now?” which you answered “Yes.” Did you so testify?

A. Yes, sir; Judge Unsworth has the empty cartridge—picked it up.

The COURT.—No, he is asking you whether you so testified at the coroner’s inquest.

Mr. KEPNER.—I ask that that portion of the answer be stricken as not responsive.

The COURT.—That may go out, except the “yes,



(Testimony of C. P. Ferrell.)

sir''; it is not responsive.

WITNESS.—If you will give me a chance to explain those questions; I have not saw the questions.

The COURT.—Sheriff, you have no interest in this case at all, and just answer the questions that are asked of you, and if you want an opportunity to explain, one or the other counsel will give you an opportunity. [124]

WITNESS.—I want to answer the questions truthfully, but I don't want to be confused with the questions.

The COURT.—Counsel cannot confuse you by simply reading to you what purports to have been testified to by you at the coroner's inquest, and asking you if you so testified.

WITNESS.—If he will ask the questions in rotation, as I testified.

The COURT.—He is asking them apparently exactly as it occurred from the reporter's transcript of the testimony.

WITNESS.—One question after another?

The COURT.—Yes, one question after another.

Mr. KEPNER.—That is all.

Mr. HAWKINS.—That is all.

### **Testimony of F. O. Chick, for Defendant.**

Mr. F. O. CHICK, called as a witness on behalf of the defendant, after being sworn, testified as follows:

#### **Direct Examination.**

(By Mr. HAWKINS.)

Q. Mr. Chick, you live in Reno, and have for some

(Testimony of F. O. Chick.)

time?      A. Yes, sir.

Mr. KEPNER.—I will save time by admitting this witness is the F. O. Chick referred to in the testimony; he is the man who was present at the autopsy by the sheriff and the coroner.

The COURT.—Well, that may not cover what they wish. Proceed with the examination.

Mr. HAWKINS.—(Q.) Taking up the admission, you went to the scene where you found the body of William C. Neasham?      A. I did.

Q. On February 27, 1915?      A. Yes, sir.

The COURT.—(Q.) Did you go out with the sheriff?      A. Yes, sir.

Mr. HAWKINS.—(Q.) And who else?

A. The coroner.

Q. Coroner Unsworth?

A. Coroner Unsworth, yes, sir.

Q. When you arrived at the scene you saw the body of Mr. Neasham there, did you?      A. Yes, sir.

Q. State the position the body was in when you first saw it?

A. The body was lying on the right side, in a curled position, the right arm lying a little ways from the body.

Mr. KEPNER.—I didn't hear that.

The COURT.—The right arm lying a little ways from the body. [125] don't understand what you mean by that; it was not severed from the body, was it?

A. The arm was lying in a reclining position away from the body; that is, the body was lying on the

(Testimony of F. O. Chick.)

right, the arm was just dropped on this side.

Mr. HAWKINS.—(Q.) Did you observe the wearing apparel that the deceased had on at that time; if so, state what it was, and its condition?

A. He was dressed in a full suit of clothing, and an overcoat.

Q. State the condition of his clothing, if you observed?

A. The overcoat was buttoned, the clothing was intact; as I remember, there was a little blood on the overcoat, on one lapel, if I remember correctly.

Q. Did you observe anything lying near the body, if so, what was it, and where was it?

A. A hat was lying—a derby hat was lying perhaps ten inches from the body.

Q. In what direction from the head?

A. To the right, that is, at the right side.

Q. The right side, about ten inches? A. Yes.

Q. What else did you see there, if anything, close to the body, and where was it?

A. A revolver was lying, I would say eight inches from the right hand.

Q. Which direction was the muzzle of the pistol from the hand, if you noticed? A. I can't say.

Q. What was the condition of the ground around the body, if you observed at that time?

A. A sandy condition.

Q. What did it show, if anything, about tracks, or anything else?

The COURT.—If you observed, if you didn't, why, say so.

(Testimony of F. O. Chick.)

A. Well, I observed a few tracks coming from the east toward the body; I didn't take much interest in that; I was interested in other matters.

The COURT.—(Q.) Were you an officer at the time?     A. I am the undertaker.

Q. Oh, you were the undertaker?     A. Yes, sir.

Mr. HAWKINS.—That was covered in counsel's statement, that this witness was the undertaker.

The COURT.—I had him confused with the coroner.

Mr. HAWKINS.—(Q.) State the physical condition of the face and head [126] of the body when you saw it there, as to any wounds or not, and if any, what were they, and what did you see?

A. The mouth was covered with blood; the wound I could not see.

Q. Why?     A. It was inside the mouth.

Q. Any other blood or fresh wound, or anything on the body at that time that you saw?

A. At that time?

Q. Yes.     A. No, not that I saw.

Q. What about the teeth?

A. There were no scars on the lips at all; the teeth were intact.

Q. What became of the body after you saw it there, as you have testified?

A. We took it to our parlors—Perkins, Gulling Company.

Q. After it arrived at the undertaking parlors of Perkins and Gulling—you are an employee, or are interested in that undertaking firm of Perkins and



(Testimony of F. O. Chick.)

Gulling, are you?      A. I am.

Q. After it arrived there did you make further examination of the body, if so, state what you did in reference to the matter?

A. After we got the body there we undressed it preparatory for the doctor's view.

Q. State whether or not there were any bruises or injuries on the body other than what you have testified to; any blood on it anywhere, any black and blue places, any cuts, any burns, anything showing any fresh wounds of any kind, other than the wound in the mouth that you have mentioned?

A. Any scars of any kind, did I understand you?

(By direction the reporter reads the question.)

A. Well, there was a scar on the forehead.

The COURT.—Well, what counsel wants to get at, Mr. Chick, is whether or no you saw any evidences of what you would characterize as violent injury, that is, the effect of a bruise or blow, an external wound? You say there was something on his forehead, what was that?

A. Well, there was a scar in front, and under the hair, presumably—

Q. Like a blow, or what?

A. It was a white streak, as I remember.

Mr. HAWKINS.—(Q.) It was a white streak, there wasn't any black and blue place there?

A. No.

Q. No cut?      A. No. [127]

Q. No abrasion of the skin?      A. No.

Q. No blood there?

(Testimony of F. O. Chick.)

The COURT.—Don't lead the witness, let him tell the condition of the body.

Mr. HAWKINS.—(Q.) Did you or not examine the wound in the mouth? A. I did.

Q. What did you do in examining that wound?

A. Opened the mouth, and ran my finger in the wound.

Q. Where was the wound in the mouth that you say you ran your finger into?

A. It was on the right side of the throat, just above the palate.

The COURT.—(Q.) In the throat, or was it above?

A. By running your finger in, it was a little to the right, above; that is, it would be a little above the palate.

Q. Down quite low? A. Yes, above the palate.

Mr. HAWKINS.—(Q.) So to get your finger into the wound, you had to insert your finger into his mouth? A. Yes, sir.

Q. How far into the wound did you extend your finger? A. Only a short way.

Q. Why did you only extend it a short ways?

A. My finger wasn't long enough.

Q. How big is your finger that you extended into the wound?

A. Well, it is the middle finger that you would have to use, it is the longest.

Q. Well, about how big in diameter is your middle finger that you put into this wound in the deceased's mouth?

A. Five-eighths of an inch, perhaps.

(Testimony of F. O. Chick.)

Mr. KEPNER.—He might hold his finger up.

The COURT.—Five-eighths of an inch would be a pretty good size finger, I think.

WITNESS.—Well, I guess possibly it would not be that.

The COURT.—About three-quarters of an inch, I should think. It would depend upon whether counsel means diameter or the circumference; of course there is a very decided difference. [128]

Mr. HAWKINS.—I asked, as I remember it, the diameter of his finger.

The COURT.—You didn't say the diameter, you said the size.

Mr. HAWKINS.—Read the question.

The COURT.—He has answered it, it is not necessary to take up the time.

Mr. HAWKINS.—(Q.) When you arrived at the scene did you observe whether the deceased was dead or not at that time?

A. I examined Mr. Neasham, and I found that there was a very slight pulsation of the heart.

The COURT.—(Q.) When you got there?

A. Yes, sir.

Mr. HAWKINS.—(Q.) Did you or not examine the clothing to ascertain what the deceased had upon his body? A. I did.

Q. Do you remember what you found?

The COURT.—You mean any personal articles?

Mr. HAWKINS.—Yes.

A. That I could not say, as the coroner was there and everything was turned over to him; that has gone

(Testimony of F. O. Chick.)

from me now; I know that I saw everything that was there.

Q. When you arrived at the scene, you and the sheriff and the coroner, were there any other parties there at that time?

A. There were two men, two or three men there at the time.

The COURT.—(Q.) Around the body?

A. In that vicinity, yes; not right at the body.

Mr. HAWKINS.—(Q.) Where were they, if you remember, when you arrived?

A. As I remember, there was one man met us at the gate from the main road leading into this lane, and directed us the way to go to where Mr. Neasham's body was; and the other two men, as I remember, were on the railroad, standing on the railroad track above where Mr. Neasham was lying in the pit below.

Q. Do you remember who those people were?

The COURT.—(Q.) Did you know them?

A. I did not.

Mr. HAWKINS.—(Q.) Do you recall now who they were?     A. I can't recall their names.

Q. Do you recall what became of them when you came back to town?

A. As I remember, one of them anyway, came back with us in the machine; [129] I would not say whether the other two did or not, I don't recall that, but one of them came back to town with us in the machine.



(Testimony of F. O. Chick.)

The COURT.—(Q.) Did you bring the body back with you in the car?

A. No.

Mr. HAWKINS.—(Q.) How did you bring the body back to town?

A. I had two of these men that were at the track when we got there, I had them go to a nearby house, and telephone the office.

The COURT.—(Q.) For a wagon?

A. For a wagon, yes.

Mr. HAWKINS.—(Q.) Did you stay there until the wagon came?

A. I did, yes.

Q. These men that were there, do you know whether or not they testified at the coroner's inquest afterwards?      A. Only through—

The COURT.—I suppose the record will show that; that is not a matter that this witness can testify to.

Mr. HAWKINS.—No, it does not show in that manner.

The COURT.—Oh, you want him to identify them as the same men who testified at the coroner's inquest?

Mr. HAWKINS.—Yes, that is, if I can. (Q.) Do you know whether or not the men who were there, and the man that you say came in with you afterwards, testified at the coroner's inquest?

A. I can't say to that, as I didn't stop at the inquest; if I remember correctly, I was one of the first that was examined, and I left immediately, but one of the gentlemen that were there, came into the

(Testimony of F. O. Chick.)

parlors after we had come back from there, and inquired what time the inquest would be held, and where, and I directed him to the city hall; that is as far as I can say.

Q. I call your attention to Defendant's Exhibit Number 2; how did the wagon get into there to get the body, if it did? (Hands exhibit to witness.)

A. From the lane that runs up from the main road to the Asylum.

Q. Where was the body when you got there with reference to the wagon track down in the bottom of that pit?

A. Mr. Neasham's feet were lying almost in the wheel track.

The COURT.—(Q.) At the side of the track, the wagon track?

A. Right at the side of the wagon track. [130]

Mr. HAWKINS.—(Q.) What size man was Mr. Neasham?

A. Mr. Neasham was a very large man in stature.

Q. Well, approximately how tall?

Mr. KEPNER.—Is not that in the record already, Mr. Hawkins?

Mr. HAWKINS.—No.

The COURT.—Well, what is the materiality of it?

Mr. HAWKINS.—It may and it may not develop to be very material. I would not ask it unless I thought it material, and it will only take a minute.

The COURT.—(Q.) What was he, a man about six feet?

WITNESS.—Yes, I would say so.

(Testimony of F. O. Chick.)

Q. A large man?

A. A large man, yes; I would say he would weigh two hundred pounds.

Q. Did you know him before his death?

A. I did.

Q. What was his business?

A. As I knew him, a rancher.

Q. He was a rancher?      A. Yes.

Q. A strong man physically?      A. Yes, sir.

Mr. HAWKINS.—That is all.

Cross-examination.

Mr. KEPNER.—(Q.) What time did you arrive at the oil-pit, Mr. Chick?

A. About ten o'clock in the morning.

Q. Of the 27th of February?      A. Yes, sir.

Q. The sheriff and the coroner arrived there at the same time you did?

A. I took the sheriff and coroner in the car.

Q. In your car?      A. Yes, sir.

Q. I understood you to say that you thought you detected a slight fluttering of the pulse?

A. Yes, sir.

The COURT.—He said the heart was still beating slightly.

Mr. KEPNER.—(Q.) Where did you take the pulse, at the heart or at the wrist?

A. At the wrist.

Q. You thought you detected a slight pulse beat?

A. A fluttering, yes.

Q. Did you take the pulse with your finger or with your thumb?

(Testimony of F. O. Chick.)

A. My finger, if I remember correctly.

Q. Are you quite sure, Mr. Chick, that the deceased had an overcoat [131] on?

A. I am almost sure.

Q. Have you the clothes that you removed from the body? A. I have.

Q. Here? A. Yes, sir.

Mr. KEPNER.—I ask that they be produced.

(Witness produces clothes.)

Mr. KEPNER.—(Q.) Will you take the coat; you spoke of there being blood on the coat.

The COURT.—On the lapel of the overcoat.

Mr. KEPNER.—(Q.) Look at that coat, and state whether that is the blood you refer to? (Indicating on coat.)

A. That is the blood, yes.

Q. And where is that on the coat?

A. That is on the sleeve.

Q. What sleeve?

A. The right. I thought there was an overcoat, but that was just from my—

The COURT.—Oh, the human memory is not perfect.

WITNESS.—That is, I haven't noticed the clothes, or I haven't thought of that; it struck me there was an overcoat; that is all the clothes there were, so it is very evident there was not.

The COURT.—(Q.) Do you now refer to the place on the sleeve where you saw the blood; you stated before it was on the lapel of the overcoat?

A. That was the way I remember it; I could not



(Testimony of F. O. Chick.)

say; I know I saw some blood on the front of the coat.

Q. As you saw the body lying, how would the blood get on the coat at the elbow there?

A. With the arm lying in this position (illustrating), a man's head lying at the right.

Q. You didn't state the head was lying on his arm; you said the arm was lying partly under the body?

Mr. KEPNER.—He said the arm was lying slightly away.

The COURT.—Yes; it was the sheriff that said the arm was lying slightly under the body.

WITNESS.—He was lying on the right side.

The COURT.—(Q.) Was his head or mouth lying on that arm?

A. No.

Q. How would that blood get on there?

A. Unless the head was lying in the position this blood was. [132]

Q. You saw it, we didn't see it; all we want to know is the fact. You stated that the blood was on the lapel, of course it might have fallen from the mouth on to the lapel; now you suggest that place on the arm as the discoloration of blood, and I want to know how, as you found the body lying, it could have gotten there.

A. I gave my answer as I remembered it, Judge; it was over a year ago, and that was the way that it came to me.

Q. As refreshed by what you now assume to be blood making that discoloration on the sleeve, can you state whether the man's head was lying on his

(Testimony of F. O. Chick.)

arm, instead of away from the body?

A. The head might have been—

Q. Wait a moment, Mr. Chick; it is not what might have been; if you don't remember, say so, but don't speculate; tell us what the fact was.

A. I will have to say I don't remember.

The COURT.—We don't want speculation; the jury is not permitted to speculate themselves, and they cannot undertake to decide cases on mere speculation of witnesses; they want facts.

Mr. KEPNER.—I ask that this coat be marked Plaintiff's Exhibit "C" for identification.

The COURT.—Very well.

Mr. KEPNER.—And I offer the coat in evidence at this time.

The COURT.—(Q.) That was the coat taken from the body, was it?

A. Yes.

(The coat is admitted in evidence, and marked Plaintiff's Exhibit "C.")

Mr. KEPNER.—(Q.) Speaking of this— I think you referred to it as a scar in the forehead—will you describe that scar to the jury?

A. As I remember the scar, it was about an inch and a half long, starting about at this part of the frontal bone (showing), and just running in under the edge of the hair.

Q. How deep was it?

A. Well, that I can't say; it was very slight; it was more like a white streak in the flesh where it had healed.

(Testimony of F. O. Chick.)

Q. I object to your stating that; simply state your observation, Mr. Chick.

Mr. HAWKINS.—That is what he was stating.  
[133]

The COURT.—I think the answer was entirely proper. You asked him to state, and any of us are permitted to state what appeared to us to be the character of a mark on a body.

Mr. KEPNER.—(Q.) Will you just indicate on my forehead about the point where that scar started? (Witness indicates on counsel's forehead.)

A. Starting at that point, and running back into the hair; just about an inch and a half, I would say, as I remember it.

Q. Will you just indicate on my head the place where that wound which you traced into the mouth, had its point of exit, if it had come out.

The COURT.—I think that is a very difficult thing for anybody to tell, as long as it didn't come out; it might have come out of the ear, or might have come out of the throat—you can't tell anything about it. It is pure speculation, directly in line with the question you objected to from the other side.

Mr. KEPNER.—I think perhaps it is, your Honor.

Q. The wound in the mouth, as I understood you to say, was the size of your finger?

A. I could get my middle finger—I could insert my middle finger in the wound.

Q. Middle finger of which hand?

A. My right hand.

Mr. KEPNER.—That is all.

(Testimony of F. O. Chick.)

Redirect Examination.

Mr. HAWKINS.—(Q.) Mr. Chick, will you tell us about what you observed in reference to this slight scar, which you have referred to as being on the deceased's head, and above the right eye, as to its appearance?

Mr. KEPNER.—He didn't refer to it as a slight scar.

Mr. HAWKINS.—I beg your pardon, he did.

The COURT.—Leave out the "slight," and ask him to describe the scar.

Mr. HAWKINS.—(Q.) Just describe that scar that you referred to on the forehead; tell the size of it, its appearance, and all about it, as you observed it.

A. The scar was whitish in appearance, an inch and a half long, and perhaps three-sixteenths of an inch in width, as I remember it.

Q. Well, what was its appearance as to being fresh or old? [134]

Mr. KEPNER.—That is a matter, I think, of expert opinion.

The COURT.—I hardly think so; I think any one can testify to a physical fact of that kind. Of course it is not infallible. We have often seen wounds that look old, that had recently been made; that is, those that did not break the skin, but caused only an abrasion. It is not a definite subject; surgeons can only give their estimate as to about how long before a wound found on a body was made. But bruises and



(Testimony of F. O. Chick.)

wounds of a character made with blunt instruments, and wounds made with sharp instruments, are of such common observation that most any one can give an opinion. The jury are the judges of the value to be attached to it, but it is admissible, I think.

(By direction the reporter reads the question.)

A. It looked old.

The COURT.—(Q.) It looked as though it had not been made recently, you mean?

A. Yes, sir, as far as I could see.

Mr. HAWKINS.—(Q.) Was the skin broken there, or not? A. No, sir.

Q. Was the place on the forehead at and immediately around the—

The COURT.—He has described that often enough, Mr. Hawkins; he told where it commenced and where it ran.

Mr. HAWKINS.—Yes; I was going to ask him whether there was any contusion or blue spot or black spot there.

The COURT.—Well, you may ask him that.

Mr. HAWKINS.—(Q.) Was there or not a blue or black spot around the vicinity of this whitish looking scar, as you have described?

A. There was not.

Mr. HAWKINS.—That is all.

Recross-examination.

Mr. KEPNER.—(Q.) Now, as a matter of fact, Mr. Chick, I will ask you if the bottom or lowest part of that scar was not slightly discolored?

(Testimony of F. O. Chick.)

A. I don't remember of only just a whitish look it had.

Q. You base your judgment that it was an old scar on the fact there was no blood in that vicinity?

A. I base my judgment on that as upon previous scars that I have seen. [135]

Q. There was no blood?      A. Not there.

Q. And no discoloration?

A. Not as I remember it, only just as I say, the whitish color.

Mr. KEPNER.—That is all.

Mr. HAWKINS.—That is all. At this time, if the Court please, I wish to offer in evidence parts of the pleadings, and will read into the evidence certain parts of the defendant's amended answer.

The COURT.—Read the answer on which the case is being tried?

Mr. HAWKINS.—Yes, your Honor.

The COURT.—It is not necessary; it may always be referred to.

Mr. HAWKINS.—I know it may be referred to, but I would like to read that into the record as part of the evidence.

The COURT.—It is not necessary to offer it as evidence; it is a part of the record, you can always read it—read it to the jury in argument, or read it to them at any time. You are never called upon to offer pleadings in evidence. The Court cannot permit matters of that kind to be put in the record. If a pleading has been superseded by an amended pleading, so that it does not necessarily figure in the trial

of the cause unless attention is called to it, it may be referred to for the purpose of showing an admission or declaration, or anything of that kind.

Mr. HAWKINS.—May I offer it, subject to your Honor's ruling?

The COURT.—Yes, you may offer it.

Mr. HAWKINS.—I desire to offer in evidence, and to read from, the defendant's amended answer, the paragraph numbered one of the affirmative defense; and I desire to offer in evidence and to read into the record, paragraph numbered five of the plaintiff's reply. Do I understand that I may read that, or does your Honor object?

The COURT.—You may read it at any time; it is not to go into the evidence; I have already ruled upon that.

Mr. HAWKINS.—To save the record, may I have an exception to your Honor's ruling?

The COURT.—You are permitted to read it to the jury as a part of the pleadings, because it is admitted to be a part of the pleadings, as [136] I understand the other side, they don't object.

Mr. HAWKINS.—I desire to offer in evidence a certified copy of the inventory and appraisement in the matter of the Estate of William C. Neasham, deceased, and petition for sale of real estate in the matter of the Estate of William C. Neasham, Deceased, together with the schedules thereto attached; and a certified copy of the order of sale of real property in the matter of the Estate of William C. Neasham, Deceased, all pending in the Second Judicial

District Court of the State of Nevada, in and for the County of Washoe; the three instruments referred to being all certified by one certificate, and under one cover.

Mr. KEPNER.—Objected to, if the Court please, as incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. HAWKINS.—Showing the nature of the estate, condition of it as to motive for suicide.

The COURT.—What is that?

Mr. HAWKINS.—Showing the condition of the estate as to the matter of the deceased being involved financially, as going for what it is worth, as to motive leading to the question of suicide. The papers I have offered show insolvency.

The COURT.—What is the feature that shows insolvency?

Mr. HAWKINS.—The petition for sale of the real estate sets forth it is necessary to sell it in order to pay the debts, which is conclusive that the estate is insolvent.

The COURT.—Well, if it has any bearing. I think there is no doubt but what you are entitled to show motive, if you can, but I think this bears very remotely upon anything of that kind.

Mr. KEPNER.—I don't insist on my objection.

The COURT.—I don't think there is any reason why it should not go in; I will admit it.

(The papers offered are marked Defendant's Exhibit No. 4.)

Mr. HAWKINS.—I desire at this time to read



depositions on behalf of defendant, which have been taken and published, beginning with the deposition of Seymour M. Ballard. There are three depositions taken at the same time, and certified together, being depositions of Seymour [137] M. Ballard, Edward A. Anderson, and Norman R. Haskell.

(Counsel for defendant commences the reading of the deposition of Seymour M. Ballard.)

Mr. KEPNER.—We renew the objection. (Referring to objection on page 2 of the deposition of Seymour M. Ballard.)

The COURT.—What is the purpose of that part of the deposition; what does it bear on?

Mr. HAWKINS.—This is with reference to the nonpayment of the premium.

The COURT.—This has nothing to do with that. Why don't you just go to that part that is material? Very frequently at the time a deposition is taken it cannot be known just what will be material, and the witness is sometimes examined on a lot of things. This would not bear on the question of payment.

Mr. HAWKINS.—Yes; in the policy there are statements which the party is bound by, and it applies to the whole matter, which I will show upon the presentation of the case, your Honor. I suggest it is ten minutes after twelve, and unless your Honor objects, that we take a noon recess at this time.

(The Court admonishes the jury, and a recess is taken until 1:30 P. M.)

Thursday, March 9, 1916.

AFTER RECESS—1:30 P. M.

(All parties present.)

Mr. HAWKINS.—If the Court please, may the record show that Defendant's Exhibit 4, being the Estate papers, will be considered as having been read to the jury?

The COURT.—Yes.

Mr. HAWKINS.—Just before we took a noon recess, I had begun to read some of the depositions; with the consent of Court and counsel, I would like to suspend that, and put on some of the witnesses who are here.

The COURT.—Very well. [138]

**Testimony of Dr. S. C. Gibson, for Defendant.**

Doctor S. C. GIBSON, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination.

(By Mr. HAWKINS.)

Q. Your name is S. C. Gibson?

A. S. C. Gibson.

Q. What is your profession and occupation, Doctor?

A. Doctor of medicine.

Q. How long have you been a doctor of medicine?

A. About thirty-five years.

Q. You have been engaged in the profession during that time?

A. All of that time.

Q. Are you a graduate of any school of medicine, if so, what?

A. Missouri Medical College.

Q. You live in Reno, Nevada?

A. Yes.

(Testimony of Dr. S. C. Gibson.)

Q. And have for how long?

A. A little over twenty years, about twenty years.

Q. You were living in Reno in February and March, 1915?      A. Yes.

Q. Did you or not at that time hold any official position, if so, what?

A. Yes, county physician of Washoe County.

Q. County physician?      A. County physician.

Q. How long have you been county physician of Washoe County, Nevada?

A. Well, this time I guess about three years; I have been before, four years ago.

Q. And altogether, how long have you served in the capacity of county physician of Washoe County?

A. Oh, perhaps seven or eight years.

Q. Did you know William C. Neasham in his lifetime?      A. I did.

Q. How long have you known him?

A. Oh, I guess I have known him—well, for several years, maybe thirteen years, or sixteen years.

Q. Do you recall the time of his death?

A. Yes, I held a post-mortem on the body, and examined the body.

Q. You held a post-mortem on his body; what date was that, Doctor?      A. February 27th, 1915.

Q. Please state fully, and in your own way, what that post-mortem disclosed; what you found, what you saw, and what you did in making this post-mortem on the body of Mr. Neasham, stating specifically and definitely [139] all the wounds that

(Testimony of Dr. S. C. Gibson.)

you found, the nature of them, and where they were, and all about it.

A. On that date, on the 27th, I was phoned by the undertaker, Unsworth—Judge Unsworth—to go to Perkins and Gulling's undertaking parlors, and hold a post-mortem on the body of Mr. Neasham, stating that he had shot himself that day.

Mr. KEPNER.—I ask that go out.

The COURT.—Counsel simply asked you, Doctor, if you performed an autopsy; you said you did, then he asked you to go ahead and state the results.

A. I found a wound on the right side of the throat, penetrating, and also a fracture of the skull, of the back part of the skull, in the occipital region.

Mr. KEPNER.—What is that?

A. In the occipital region, the back part of the skull, just above and to the right of the prominence of the skull, what we call the occipital protuberance; that is the only way I can describe it, I don't know what else to call it.

Mr. HAWKINS.—All right, go ahead.

A. As I stated before, I found a wound in the throat, a penetrating wound, introduced my finger into his throat, and found the wound; and also I could touch fractured bone in the wound; then I examined the posterior part of the skull, and found it prominent.

Q. What do you mean by "found it prominent"?

A. Well, found a lump that was unnatural there.

Q. Go ahead.

A. Then I removed the scalp; I turned it back



(Testimony of Dr. S. C. Gibson.)

from the head, and I found a fracture, a stellated fracture—a star-shaped fracture, and a piece of the bone pushed out beyond the surface of the contour of the bone.

The COURT.—Well, proceed, Doctor.

A. That is about all I did, unless you ask me some more questions.

The COURT.—Well, the wound you have described in the throat, and the fracture of the skull, did you ascertain whether they were produced from one and the same cause?

A. No; from the history of the case—[140]

Q. No, I am talking about your autopsy, not the history.

A. That is the way we make our diagnosis, Judge—the doctors, is by history.

Q. But you can only testify to what you did, and what the results of your examination were.

A. Well, I found a penetrating wound in the throat, and a fracture of the bone; then I removed the scalp, pushed it back, the posterior scalp; then I found a prominence there, a fracture there—a stellated fracture.

Q. You testified to that. Didn't you go into the cavity at all?      A. No.

Q. Didn't you examine to see what it was that had produced this?

A. No, I tell you why I didn't; his brother-in-law was there, and he requested me not to cut the body any more than I had to.

Q. You were there to ascertain what caused the

(Testimony of Dr. S. C. Gibson.)

death, were you not?

A. The cause of death, and I found out what was sufficient.

Q. Would the wound in the throat cause death?

A. Yes, both causes, anterior fracture and posterior fracture.

Q. That is all you did, turned down the scalp to ascertain what the cause of this protuberance on the skull was, and found there was a stellated fracture there, with a piece of bone displaced? A. Yes.

Q. But what produced that you didn't investigate?

A. No.

Q. Was the appearance of the skull at the point of this protuberance such that the effect found there could have been produced by a blow?

A. It had driven out.

Q. It was forced out?

A. It was forced from the inside.

Q. Apparently?

A. Apparently, yes, from the inside.

The COURT.—I think it is a very sad thing in this case that somebody interested was not there at the time, to have a proper investigation made as to all the circumstances.

Mr. HAWKINS.—That may be true, your Honor, yet it seems to have been a fact that nobody paid any attention to it.

Q. Where was the protuberance in the back part of the skull located, with reference to the entrance or beginning of the wound which you discovered in the back part of the throat?

(Testimony of Dr. S. C. Gibson.)

A. It was posterior, of course it was back and a little upwards, I have a skull here that I can show [141] you. (Witness produces skull.)

Mr. KEPNER.—What is this, a skull or the skull?

A. It is a skull.

Mr. HAWKINS.—(Q.) Now, Doctor, using the skull, take your time and explain in detail just where the entrance of the wound which you discovered in the back part of the throat of the deceased was.

A. I should judge the entrance was about here (indicating on skull).

Q. Now, will you indicate where “here” is, so that it may appear in the record.

A. Just anterior and above the foramen magnum.

The COURT.—(Q.) It was a little to the right, and above the palate, wasn't it?

A. It went through the soft palate.

Q. I mean by the palate, what we understand among laymen as the palate, is the little protuberance?

A. The curtain that hangs down, it went through there on the right of the *medium* line, and it also came out at the right of the *medium* line, at the occipital protuberance, a little above that, and just about here; I should judge just about there (showing on skull).

Mr. HAWKINS.—(Q.) Did the wound cut the hard palate of the mouth or not? A. No.

Q. What was it you said it cut?

A. The soft palate.

(Testimony of Dr. S. C. Gibson.)

The COURT.—(Q.) That is, the tissues to which the curtain is hung?

A. That is the curtain.

Mr. HAWKINS.—(Q.) Did the tongue show any evidence of injury?

A. No, neither the tongue, nor the lips, nor the teeth.

Mr. KEPNER.—What is that?

A. The tongue showed no injury.

The COURT.—Neither the tongue, lips, nor teeth, he said, showed any evidence of injury.

Mr. HAWKINS.—(Q.) What was the character of the entrance of the wound into which you say you inserted your finger?

A. It was ragged, and also small comminuted fractures.

The COURT.—(Q.) What bone?

A. I think the occipital bone. From there to here is the occipital bone. (Showing on skull.)

Mr. HAWKINS.—(Q.) Then if I understand, in inserting your finger [142] into this wound, your finger came in contact with the bones?

A. With the fractured bones; yes.

The COURT.—(Q.) That fractured bone your finger came in contact with was not the fracture in the skull? A. Not the posterior, no.

Q. Not the posterior? A. Oh, no.

Q. If the wound you found in the throat, Doctor, was produced by some agency, which continuing on, produced this fracture of the occipital bone here, which you found in the posterior region of the skull,



(Testimony of Dr. S. C. Gibson.)

if that passed in a practically direct course from the point of entrance to the point where you found this fracture, it would pass through the base of the brain?

A. Through the base of the brain, yes.

Q. And would be sufficient to cause death?

A. Sufficient to cause death, yes.

Mr. HAWKINS.—(Q.) What would be the effect upon a person receiving a wound which you have described, in the manner in which you have described it?

A. Such a wound as I have described would produce immediate death.

The COURT.—(Q.) Produce what?

A. Immediate death.

Mr. HAWKINS.—(Q.) Have you or not had in your experience much or little practice in reference to gunshot wounds?

Mr. KEPNER.—Objected to as immaterial.

The COURT.—No, I don't think so. I think that inquiry is material.

Mr. KEPNER.—I think it is immaterial, because he has testified to the essential facts without objection.

The COURT.—The witness has not pretended to say what produced this wound at all; he has described a wound, but he has not pretended to say what was the producing cause of it. Have you had any considerable experience in the treatment of gunshot wounds, counsel asks you.

A. Not very extensive, just in civil practice, nothing like a military surgeon.

(Testimony of Dr. S. C. Gibson.)

Q. You have come in contact in your practice with gunshot wounds?     A. Yes.

The COURT.—Now, what question do you want to ask?

Mr. HAWKINS.—(Q.) Can you state the difference between a gunshot [143] wound, or a pistol-shot wound, made by the pistol being fired close to the object that it strikes, and when it is some distance from the object?

Mr. KEPNER.—Objected to. That is the same question that was asked this morning, and I objected to it as incompetent.

Mr. HAWKINS.—I don't think so.

The COURT.—Yes, I think so. That involves the same element as the question you put to another witness this morning.

Mr. HAWKINS.—I would like an exception to the ruling, and I would like the record to show that we offer to prove by this witness that—

The COURT.—I don't accept offers to prove; you can ask any question, and I will rule on it, and you can take your exception accordingly.

Mr. HAWKINS.—Then to make the record, if the Court please:

Q. If a pistol-shot was fired with the pistol close to the anatomy of a human person, right up close to it, would there be any difference between the character of the wound thus made and the character of a wound received by a bullet from the same pistol, fired at some distance from that object?

Mr. KEPNER.—That is objected to, if the Court

(Testimony of Dr. S. C. Gibson.)

please, as incompetent.

The COURT.—The objection is sustained.

Mr. HAWKINS.—We desire an exception to the ruling of the Court.

Q. Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by some one else?

Mr. KEPNER.—Same objection, if the Court please; it is incompetent.

Mr. HAWKINS.—If the Court please, there is not any question in this record, but what this was a gunshot wound.

The COURT.—No, but your question is wholly incompetent; it is not a subject of expert testimony at all.

Mr. HAWKINS.—There are a number of authorities which so hold, your Honor.

The COURT.—The jury is composed of sensible men; they are competent to form judgments and draw deductions; you can lay before the jury [144] the facts, and argue to them your theory as to how this wound was produced, and they will draw their conclusion, but it is not the subject of expert testimony to ask the witness, however well versed in surgery or medicine he may be, as to whether a given wound was more likely to have been produced upon a person by the individual himself, or a third person.

Mr. HAWKINS.—I would like to say this: Where the wound is internal, and where the ordinary man

(Testimony of Dr. S. C. Gibson.)

does not come in contact with it—the ordinary man a juror, and we have shown the location of this wound as it has been located by this doctor, that it is not governed by the same rules that apply to external wounds.

The COURT.—It is perfectly competent to ask this witness how such a wound might be produced, by what sort of instrumentality; whether it was a gunshot wound, or knife wound; and you can ask him whether, under ordinary conditions, a wound of that kind could be produced from some external source, without lacerating the lips or the tongue, or breaking the teeth, or things of that kind, and from those things the jury can draw the deduction you are asking this witness to state as an expert. It is not the subject of expert deduction.

Mr. HAWKINS.—I will take the benefit of an exception to the ruling.

Q. Doctor, will you state whether or not in your opinion, this wound which you have described could have been made by some instrument or gun, externally, and outside of the mouth, without injuring the lips, teeth or tongue, which you have testified were not injured?

Mr. KEPNER.—Same objection.

The COURT.—The objection is overruled.

WITNESS.—You mean from a distance outside the mouth?

Mr. HAWKINS.—Yes.

A. I can conceive of only two positions of the



(Testimony of Dr. S. C. Gibson.)

throat, tongue, lips and mouth that such a wound could be made.

The COURT.—(Q.) From an external source?

A. From an external source, and that would be in the act of yawning, or retching, or in that position of the throat or tongue (illustrating).

Q. Suppose that the mouth was open, in the act of hallooing. [145]

A. Well, yes; it might be that way; in that case the voice would be hoarse and low-pitched; I mean in that position (illustrating).

Q. In other words, it would be like a man in agony throwing his mouth open?

A. He would have to depress his tongue (illustrating).

Q. Yes, his tongue had to be depressed.

A. His tongue had to be depressed, because in examining the body I tried to look, to see the wound through the mouth by depressing the tongue, and I could not do so.

Mr. HAWKINS.—(Q.) Why could you not see the wound?

A. I could not depress the tongue.

The COURT.—(Q.) The tongue obstructed it?

A. Yes, I could not press it down far enough to see the wound, I tried it.

Mr. HAWKINS.—Now, I would like to ask this question, your Honor:

Q. What is your opinion as to whether the wound was inflicted by William C. Neasham himself, or by another?

(Testimony of Dr. S. C. Gibson.)

Mr. KEPNER.—That is objected to.

The COURT.—Do not repeat a question I have ruled on.

Mr. HAWKINS.—I just wanted to make the record, your Honor.

The COURT.—I have already ruled on it

Mr. HAWKINS.—We will take an exception.

Q. What size man was Mr. Neasham?

A. He was a large man.

Q. A strong powerful man physically?

A. Yes.

Mr. HAWKINS.—That is all.

Cross-examination.

Mr. KEPNER.—(Q.) Calling your attention to this skull that you are using to illustrate your testimony, with the protuberance which you say existed at the back part of the head, state to the jury where you commenced to remove the scalp from the skull.

A. I made an incision from one ear to the other, across there; made an incision right across there, and then peeled the scalp down (showing on skull).

Mr. HAWKINS.—May I just ask one more question, your Honor?

Q. Basing your testimony upon your experience and your examination of the deceased, Mr. Neasham, I ask you to state whether or not in your [146] opinion the wound was produced by a near shot, or one fired from a distance.

Mr. KEPNER.—That is objected to as incompetent; it has already been gone into.

The COURT.—There has been no foundation laid

(Testimony of Dr. S. C. Gibson.)

for him to express an opinion upon a question of that kind.

Mr. HAWKINS.—Notwithstanding it is admitted that he came to his death by a gunshot wound, your Honor?

The COURT.—That don't make any difference. You are asking a question now which involves the knowledge of this witness as to the effect of a gunshot wound produced from a distance as compared with one at close range; this witness has not disclosed any such experience.

Mr. HAWKINS.—He has testified he has been a physician for a number of years, and has had experience with gunshot wounds.

The COURT.—(Q.) Have you ever had any experience which would enlighten your mind as to the distinctive effect of what counsel characterizes as a near shot or a far shot?

WITNESS.—No, unless it is powder burned.

The COURT.—Yes, of course; that is a different thing. The objection is sustained.

Mr. KEPNER.—(Q.) Now you were stating about the manner in which you removed the scalp, and you told me the way to do it; is that the way you did it in this case?

A. I think so; that is the way I usually do it.

Q. Cut across the top of the head, and then pull the scalp down to the back? A. Yes.

Q. Did you remove any bullet from that wound?

A. No, sir.

Q. Didn't find any bullet at all?

(Testimony of Dr. S. C. Gibson.)

A. Found no bullet at all.

Q. Who was the brother-in-law you speak of, who objected to a thorough examination of the body?

A. Mr. Curnow.

Q. What Curnow?

A. The one that keeps a store there.

Q. What is his name?

A. I have forgotten his given name; I have known him a long time.

Q. You say he objected?

A. No, he didn't object to it; he requested me not to. [147]

Q. Not to what?

A. Not to cut the body any more than was necessary.

Q. Not to mutilate the features?

A. No, he didn't say the features—I don't think he did.

The COURT.—(Q.) He didn't make any objection to your opening up the skull to ascertain what actually was the cause of these wounds, did he?

A. No, he made the request of me, so I didn't go any further.

Mr. KEPNER.—(Q.) Simply requested you not to mutilate the body any more than you had to?

A. Not any more than I had to.

Q. After removing the scalp from the head, there was nothing to prevent you from finding a bullet?

A. No; I would have had to chisel in there.

Q. Stick your finger in the wound?

A. No, I would have to chisel.



(Testimony of Dr. S. C. Gibson.)

Q. I understood you to say the skull was fractured there?

A. Fractured there, yes; a stellated fracture, I said, and a small portion pushed out, but it was not loose.

Q. And you didn't remove any bullet, and didn't make any effort to find any? A. No.

Mr. KEPNER.—That is all.

**Testimony of Dr. S. K. Morrison, for Defendant.**

Doctor S. K. MORRISON, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination.

(By Mr. HAWKINS.)

Q. Your name is S. K. Morrison? A. It is.

Q. You live at Reno, Nevada? A. I do.

Q. How long have you lived there, Doctor?

A. Fourteen years.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been so engaged?

A. Fourteen years.

Q. Are you a graduate of a school of medicine; if so, what? A. Cooper, San Francisco.

Q. What official position have you held in Washoe County, Nevada, if any? A. County physician.

Q. For what length of time?

A. Ten or twelve years.

Q. What has been the nature of your position as county physician during that period?

(Testimony of Dr. S. K. Morrison.).

A. Take care of the county poor and sick, do most of the autopsies, take care of all the accident cases, county jail, city [148] jail, insanities, court work.

Q. During this period in which you have been county physician, as stated, have you or not had to examine and take care of gunshot wounds?

A. Lots of them.

Q. From your experience in your profession, and study, and the actual experience you have had in gunshot wound cases, are you able to state whether there is any difference between a gunshot wound made by a near shot and one fired from a distance?

Mr. KEPNER.—That is objected to, if the Court please, as incompetent, irrelevant and immaterial, and assuming facts which are not in the record.

The COURT.—I don't think so. This witness has said that he has had to do with lots of gunshot wounds; if such a difference exists, why, of course, they are permitted to show it, because that is one of the very circumstances that could go before the jury.

Mr. KEPNER.—My point is this, there is no evidence before this jury of any gunshot wound; notwithstanding the admissions in the pleadings, there is no evidence here of a gunshot wound at all, or that the gunshot was fired.

The COURT.—This is a hypothetical question, and they have a right to put a hypothetical question on the theory of the evidence they conceive is sustained by it. It is very frequently the case where you can't prove a fact by direct, positive evidence,

(Testimony of Dr. S. K. Morrison.)

you have to resort to circumstances. The objection is overruled.

WITNESS.—A shot from a distance—

The COURT.—No, he is not asking you the difference. Read the question.

WITNESS.—Yes.

The COURT.—Well, do you know what the question is?

WITNESS.—He wanted to know the difference between a shot at near or far distance.

The COURT.—You are now answering his inquiry as to whether there is a difference; you say there is?

A. Yes. I have the privilege of explaining.  
[149]

The COURT.—No, you haven't now; he will ask you another question.

Mr. HAWKINS.—(Q.) Doctor, explain the difference between a wound produced by a gunshot, a near shot, and one fired from a distance?

A. When I answered the first question, I mean there is a marked difference when a gun is held against the body, because the bullet enters, and then—

The COURT.—(Q.) You mean against the body than when it is held at a distance?

A. Yes; when it is against the body the bullet enters, the gas is discharged, and the powder and so forth, blows in the soft tissues, leaving a jagged, large craterlike opening.

The COURT.—(Q.) That is when it is held against the body?

(Testimony of Dr. S. K. Morrison.)

A. Against the body. At a distance, the entrance wound almost universally is the size of the bullet. The matter of powder marks is not of much relevancy—

The COURT.—You have not been asked about powder marks.

WITNESS.—That is one of the differences.

The COURT.—Don't volunteer anything; it simply gives rise to objection, and I would have to strike it out.

Mr. HAWKINS.—(Q.) Doctor, you heard Doctor Gibson's testimony in describing the nature of this wound, and its location in the back part of the mouth of the deceased, did you? A. I did.

Q. Assuming that testimony to be true, state whether or not in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?

Mr. KEPNER.—I object to that as incompetent.

The COURT.—The objection is sustained. There is no foundation for such a question here.

Mr. HAWKINS.—If the Court please, counsel said a while ago there was no proof that this death came from a gunshot wound; plaintiff has proved that herself.

The COURT.—I am not speaking of that. Your question does not involve any element of the magnitude of the missile that was fired by the gun, or anything else—it is just a gun; it might have been one caliber, or might have been another. That is the unfortunate thing growing out [150] of the fact



(Testimony of Dr. S. K. Morrison.)

that this autopsy was not carried to a point sufficient to fully demonstrate the instrumentality that produced the death, its caliber, and so forth, except by inference, which the jury must draw.

Mr. HAWKINS.—(Q.) Assuming the testimony of Doctor Gibson as true, particularly referring to the location of the wound, and the fact that the tongue, teeth and lips were not injured, would it in your opinion be possible to have inflicted that wound by a bullet fired from a thirty-two automatic pistol, with the pistol outside the mouth of the deceased?

Mr. KEPNER.—Objected to as incompetent.

The COURT.—I think so. The objection is sustained.

Mr. HAWKINS.—We ask for an exception.

Q. Could, in your opinion, a gunshot wound be inflicted upon the deceased, making the wound described by Doctor Gibson in his testimony, without injuring the tongue, teeth or lips?

Mr. KEPNER.—Same objection.

The COURT.—No, that is precisely the question that I allowed Doctor Gibson to answer; that is, whether under normal conditions, a wound of the character described could be produced—from external sources you mean, Mr. Hawkins?

Mr. HAWKINS.—Yes.

The COURT.—From external sources, upon the person of the deceased, without injuring the lips, tongue and the adjacent soft tissues, or the teeth?

WITNESS.—Shall I answer it?

The COURT.—Yes. He is asking whether it

(Testimony of Dr. S. K. Morrison.)

could, under ordinary circumstances.

A. No, it could not.

Mr. HAWKINS.—(Q.) Explain why it could not.

A. A wound of that description would have to be caused by—if it was done by a gun, by the gun being in the mouth, or the tongue would be pierced by anything coming in through the mouth, and possibly the lips; or the teeth knocked out; it would not be possible to have a wound of that kind otherwise, except in the act, as Doctor Gibson says, of yawning or gagging, and very improbable then; because even if the tongue [151] was out of the way, to get a wound coming from the outside—well, the mouth doesn't open so far as that (referring to skull used for illustration)—and the soft part is below that; you would not get the range, unless you hit the hard palate, and the hard palate was not hit.

Q. Assuming the testimony of Doctor Gibson as true—I will ask this question, your Honor, to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?

Mr. KEPNER.—Objected to as incompetent.

The COURT.—The objection is sustained. That is a deduction for the jury, which they are just as competent to draw as this witness.

Mr. HAWKINS.—We desire an exception to the ruling. That is all.

Cross-examination.

Mr. KEPNER.—(Q.) Doctor, were you present at this alleged autopsy? A. I was not.

(Testimony of Dr. S. K. Morrison.)

Q. You did not examine the body of William C. Neasham at all? A. Never saw it.

Q. Are you the examining physician for the New York Life Insurance Company? A. I am not.

Q. Have you ever been?

A. I was, I think, the first two years I was in Reno.

Q. Never been since then?

A. Never been since then.

Q. Then you haven't been physician for the New York Life for more than ten years?

A. More than ten years.

Mr. KEPNER.—That is all.

Mr. HAWKINS.—That is all of our witnesses, your Honor. I will now read the depositions that I started to read this morning.

Mr. KEPNER.—I would like to make an objection. I understand the purpose of this is to show nonpayment of premium, is that correct, Mr. Hawkins?

Mr. HAWKINS.—That is one thing in them.

Mr. KEPNER.—I think I might as well object now as to wait until after the reading has been commenced.

The COURT.—What is your objection?

Mr. KEPNER.—It is objected to, if the Court please, as incompetent, [152] irrelevant and immaterial, first, because the policy in evidence expressly acknowledges receipt of the premium, the first annual premium, and the defendant company is estopped to deny that fact, or contradict its solemn contract by parol; second, under the pleadings the purpose is to show that the contract or policy is void

from its inception, and this the company by its own express acknowledgment of the receipt of the first premium, is estopped from doing; third, the testimony sought to be introduced through this witness is hearsay; and, fourth, the testimony sought to be introduced violates the plain provisions of section 5419 of the Revised Laws of Nevada, which provides that no person shall be allowed to testify when the other party to the transaction is dead.

(Argument on the objection by Mr. KEPNER.)

Mr. HAWKINS.—May I interrupt a moment? We do not contend that the nonpayment of this premium forfeits the contract. The purpose of this is to show that in the event of self-destruction, we are only liable for the premiums paid, and we have alleged that they were not paid, hence, if not, we are not liable for anything.

The COURT.—That is what I gathered from counsel's statement yesterday.

Mr. KEPNER.—I wish to state right now that the plaintiff is suing for the amount of this policy, and if she is not entitled to that, she don't want anything; if she is not entitled to the amount of this policy, she don't want the first premium; and I am willing to enter into a stipulation now to waive any claim for the first premium.

The COURT.—In other words, if the verdict goes against you for the amount of the policy, you would scorn, I suppose, the other?

Mr. KEPNER.—Yes.

Mr. HAWKINS.—Does that go to the extent of



admitting the first premium was not paid?

Mr. KEPNER.—No, we can prove it was.

The COURT.—No, he is simply willing to concede, they do not ask a verdict for the alternative amount the forfeiture clause would allow them in case the jury should find that the deceased took his own life.

Mr. HAWKINS.—That is not very much of a concession. [153]

The COURT.—I think it is concession enough to lay out of consideration any evidence as to whether the premium was paid, and that is all you have under discussion. In other words, the attitude of plaintiff's counsel is that they waive any claim for the premium money paid, assuming it was paid, in the event that they are not held entitled to recover on the face of the policy. Is that right, Mr. Kepner?

Mr. KEPNER.—That is the exact situation.

The COURT.—So I do not see, upon the theory you stated, Mr. Hawkins, that you need bother with the evidence as to whether it was in fact paid or not.

Mr. HAWKINS.—Will your Honor give me a few minutes to run through with this deposition?

(A short recess is taken at this time.)

#### AFTER RECESS.

Mr. HAWKINS.—If the Court please, I find these depositions go to some other matters, and I would like to read them.

The COURT.—Very well, proceed.

Mr. HAWKINS.—The deposition of Seymour M. Ballard, page 2. (Reads.)

Mr. KEPNER.—We renew the objection. (Re-

ferring to objection on page 2 of deposition.)

The COURT.—Well, I will let it go in.

(Reading of deposition continued.)

Mr. KEPNER.—We renew the objection. (Referring to objection on page 3 of deposition.)

The COURT.—What is the materiality of this under the stipulation?

Mr. HAWKINS.—The object of that is to show this is a deferred payment, which was in violation of the agent's instructions, that the agent was not permitted to do the very thing which was done in this matter.

The COURT.—Well, how does this bear on the case, Mr. Hawkins?

Mr. HAWKINS.—I would rather the Court would rule, and I will take my exception. This matter comes to me from the New York attorney.

The COURT.—I am entitled to know your theory when I rule, because it may affect my judgment.

[154]

Mr. HAWKINS.—Well, my theory is that the application recites that the applicant could not do certain things, which were done here. It is recited that he cannot defer these payments.

The COURT.—But the policy, which you concede was delivered, recites as a part of the contract, that he had paid it.

Mr. HAWKINS.—Yes.

The COURT.—Then I cannot understand how this is material to any issue in the case.

Mr. HAWKINS.—As I say, this matter is put up to us.

The COURT.—Yes, I see what you mean, that they saw fit to include it in the management of the case there, and it leaves you in a more or less delicate position to concede that it is wholly irrelevant, which I am inclined to think it is, but I will allow it to go in for the present.

(Reading of deposition continued by Mr. HAWKINS.)

Mr. KEPNER.—I would like it to be understood that each objection stated in the deposition is considered as renewed at this time.

The COURT.—Very well. I will let it all be read.

Mr. KEPNER.—Subject to a motion to strike.

The COURT.—Yes.

Mr. HAWKINS.—We may save time, and I am willing that these depositions may be considered read, and have them introduced in evidence without taking the time to read them.

The COURT.—Very well, that is agreeable to me, and (to Mr. Kepner) you can move to strike them out. They may be considered read, and anything you deem material, can be called to my attention.

Mr. HAWKINS.—Very well, your Honor; under that, defendant rests.

Mr. KEPNER.—I move at this time, if the Court please, that the deposition of Seymour M. Ballard, Edward A. Anderson and Norman R. Haskell be stricken out as incompetent, irrelevant and immaterial.

(Testimony of F. P. Dann.)

The COURT.—Well, the question is wholly beside the necessities, because they have not been read to the jury, other than that which I have already indicated as immaterial. If they are read to the jury for any purpose, then you can renew your motion, but now they are not before [155] the mind of the jury at all, and can't affect them.

Mr. KEPNER.—Very well.

The COURT.—Have you any rebuttal?

Mr. KEPNER,—Yes, your Honor.

The COURT.—Well, proceed with it.

**Testimony of F. P. Dann, for Plaintiff (In Rebuttal).**

Mr. F. P. DANN, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. What is your name?      A. F. P. Dann.

Q. Where do you reside, and what is your occupation?      A. Reno, Nevada; photographer.

Mr. KEPNER.—I ask that these three photographs be marked Plaintiff's Exhibits "D," "E" and "F," respectively, for identification.

(The photographs are marked as requested.)

Q. Look at the photograph which is marked for identification Plaintiff's Exhibit "D," and state whether or not you made that photograph.

A. I did.

Q. What does it represent?

A. It represents a cut.

Q. Whereabouts—what cut?



(Testimony of F. P. Dann.)

A. Near the Asylum, near Reno, Nevada.

Q. The cut where the body of William C. Neasham was found?

Mr. HAWKINS.—Does he know that?

Mr. KEPNER.—(Q.) Who was with you when this photograph was taken, if anyone?

A. Sheriff Burke, yourself, and the chauffeur of the machine.

Q. Is this a correct photograph of the view which it purports to represent? A. It is.

Q. In what direction was the camera situated when this photograph was taken?

A. It was situated, as I am looking at the picture, on my left, on the bank at my left.

Q. And the camera was pointing in what direction, what direction of the point of the compass?

A. The camera was pointing directly across the cut, toward the railroad; I am not certain about the points of the compass, or I would state. [156]

Q. Directly across the railroad?

A. Toward the railroad.

The COURT.—Across the cut, he said, toward the railroad.

WITNESS.—Across the cut, toward the railroad.

Mr. KEPNER.—(Q.) Look at the photograph marked Plaintiff's Exhibit "E" for identification, and state from what position that photograph was taken with reference to the cut?

A. This photograph was taken a short distance toward the Asylum, looking down the track toward the City of Reno.

(Testimony of F. P. Dann.)

Q. Calling your attention to these two individuals who appear there, who were they?

A. Yourself and Sheriff Burke.

Q. That is a correct view of the location which it purports to illustrate? A. It is.

Q. Calling your attention to Plaintiff's Exhibit "F" for identification I will ask you to state whether that is a photograph of the same cut which you have been speaking of. A. It is.

Q. Where was the camera stationed when Exhibit "F" was taken?

A. May I be allowed to correct a mistake that I made in relation to this photograph?

The COURT.—Certainly.

WITNESS.—This photograph ("D") was made standing up the cut; I said it was made standing on the bank, I should have said this one ("F"); I had the two confused; this one was made from the position I designated in my description of the first one.

The COURT.—(Q.) Then exhibit "D" was taken from up the cut toward the Asylum, looking down through the cut? A. Yes.

Mr. KEPNER.—(Q.) The camera was pointed—  
A. Toward Reno.

Mr. KEPNER.—We offer the three photographs in evidence, if your Honor please.

Mr. HAWKINS.—When were they taken?

Mr. KEPNER.—(Q) What date were those photographs taken?

A. It is written on the back of the photograph; I wrote it myself: "Made July 30, 1915."

(Testimony of Ray J. Cool.)

Mr. KEPNER.—That is all, Mr. Dann. I will by another witness show that the physical conditions were the same on the 30th of July as [157] they were on the 27th of February.

Mr. HAWKINS.—If that is shown, I have no objection to the photographs.

The COURT.—Yes, that would be proper, unless it is conceded.

Mr. HAWKINS.—I have no cross-examination.

**Testimony of Ray J. Cool, for Plaintiff (In Rebuttal).**

Mr. RAY J. COOL, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. What is your name?      A. Ray J. Cool.

Q. Where do you live?      A. Reno, Nevada.

Q. Where did you live during the month of February, 1915?      A. 607 North Virginia Street.

Q. With whom did you live?

A. Mr. and Mrs. Neasham.

Q. How long had you resided with the Neasham family?      A. Since January 3d, 1914.

Q. January 30th, 1914?      A. January 3d.

Q. You lived with them continuously, then, for about a year before the death of Mr. Neasham?

A. For thirteen months.

Q. Did you take your meals at the Neasham house, or did you just room there?

A. I roomed and boarded there.

Q. Was there any relation existing between you

(Testimony of Ray J. Cool.)

and the Neasham family at the time?

A. Mr. Neasham was my guardian at the time.

Q. Did you see the body of William C. Neasham after his death?     A. I did.

Q. When and where?

A. Why, Sunday evening was the first time, I saw it in the undertaking parlors of Perkins and Gulling.

Q. Sunday evening, what day was that?

A. That was the 28th.

The COURT.—(Q.) You mean the Sunday evening following the tragedy?

A. Yes.

The COURT.—Then that would be the next day.

Mr. KEPNER.—(Q.) That would be the next day after he died?

A. Yes, sir.

Q. What, if anything, did you observe in his appearance, or in the appearance of the body?

A. I noticed a — [158]

Mr. HAWKINS.—Just a minute. I object to that question. It is a matter after the body had been prepared by the undertakers.

The COURT.—Well, that does not appear.

Mr. HAWKINS.—May I ask a question at this time?

The COURT.—No, I don't think that is proper. You can interpose any objection you see fit, and you will have a chance to cross-examine this witness.

Mr. HAWKINS.—I object to the question on the ground it does not appear in what condition the body was; and it appearing that it was Sunday afternoon,



(Testimony of Ray J. Cool.)

or evening, after the death Saturday morning.

The COURT.—Your objection is addressed to the effect of the evidence, not its admissibility. They can't prove a chain of circumstances by one witness. If they prove by this witness that certain appearances or manifestations were on this body, then they can follow it up, and prove whether that was its condition when it was brought to the undertaking establishment.

Mr. HAWKINS.—Very well.

The COURT.—Of course, unless they do so, there would be nothing but the bald testimony of this witness as to what he saw on an occasion a day subsequent to the bringing of the body there, and it would not have the same effect it would if supplemented by evidence as to the condition being the same as when the body was brought in. It bears upon the question which is involved in issue here, that is, what probably was the cause of the death of the deceased. I suppose that is what it is directed to.

Mr. KEPNER.—Yes, your Honor.

The COURT.—Read the question.

(The reporter reads the question.)

The COURT.—What do you mean? That is very broad and general; it might refer to a condition of pallor which ensues upon death, or anything else. Do you mean with reference to physical injuries?

Mr. KEPNER.—Yes, but I didn't like to ask that question, without entrenching upon—

The COURT.—Here is a situation where the witness is being examined [159] as to a body sub-

(Testimony of Ray J. Cool.)

jected to physical injuries, that is, I mean this wound.

Mr. KEPNER.—(Q.) What did you notice on the body, particularly the head, with reference to wounds, scars, or dents in the head?

A. Over the right eye—

Mr. HAWKINS.—I want to object to that, because the plaintiff alleges the deceased came to his death by a gunshot wound.

The COURT.—That don't make any difference; he does not admit how that gunshot wound was received, does he?

Mr. HAWKINS.—No.

The COURT.—Then evidence tending to show other wounds upon the body would be circumstances from which it might be argued that the death wound was received in some encounter between himself and third parties. It only bears upon the subject; of course, it would be wholly irrelevant if he admitted the wound was received in the way that you claim.

Mr. KEPNER.—Answer the question.

A. Over the right eye, running from the forehead, is what appeared to be a dent, about an inch or an inch and a quarter long, in the shape of a crescent; and I placed my finger, little finger of my right hand, in it, in this dent, about the shape of that (indicating).

Q. How deep was it?

The COURT.—He says deep enough to lay his little finger in.

WITNESS.—Not to lay the entire finger in, but I

(Testimony of Ray J. Cool.)

should judge about around a quarter of an inch deep, something like that.

Mr. KEPNER.—(Q.) That would be substantially half the thickness of your finger?

A. Not hardly that.

Q. Just indicate on your forehead the location of that wound.

A. It was on the right side, made a sort of crescent shape, right around the edge of the hair.

Q. Had you ever seen that before?

A. No, sir; I had never seen it before.

Q. When did you last see William C. Neasham in his lifetime? A. Eight o'clock Saturday morning.

Q. On what occasion?

A. I saw him at the breakfast-table.

Q. Did you eat at the same table?

A. I did. [160]

Q. Where did he sit, and where did you sit?

A. He sat at the end of the table; there was one person between him and myself.

Q. Did you have any conversation with him that morning? A. General.

Q. What was his appearance and manner?

A. He seemed the same as he always was.

Q. What was his usual manner, as to being cheerful, or otherwise?

A. Why, he was always a pretty cheerful sort of a man, and I didn't notice any change in him that morning; he looked natural to me, the same as he always had been.

Q. Had you ever observed the dent which you

(Testimony of Ray J. Cool.)

speak of in the forehead prior to the time you saw it at the undertaking parlors?

Mr. HAWKINS.—He has answered that once before.

The COURT.—I think he did; I have the memorandum here “had never seen it before,” and he was speaking of this depression. You mean depression, perhaps. I would like to ask you, what was the general appearance of this, what you call dent; did it look as though it had been made with some instrument?

A. It looked to me like it had been hit with a pipe, or something of that shape.

Q. It was not cut?

A. No, it wasn't cut, it was pressed down.

Q. A depression? A. Yes, sir.

Mr. KEPNER.—You may cross-examine.

Cross-examination.

Mr. HAWKINS.—(Q.) Were you up, or where were you when Mr. Neasham came in that morning that you say you ate breakfast with him?

A. I didn't get up till about quarter to eight Saturday morning, and when I came downstairs he was helping around in the kitchen, Mrs. Neasham.

The COURT.—Helping what?

A. Helping Mrs. Neasham out in the kitchen, when I came down about a quarter to eight.

Mr. HAWKINS.—(Q.) You say he was your guardian? A. He was.

Q. Do you remember an accident that happened to Mr. Neasham a number of years ago, when a team ran away with him?



(Testimony of Ray J. Cool.)

A. No, I never knew of any previous accident.

Q. You said, I believe, that the skin was not broken at this point [161] that you have indicated?

A. No.

Q. Was the forehead discolored there at that place—black and blue?

A. Why, there seemed to be—there was a fine streak of blue in the bottom.

Q. Can you answer the question yes or no?

The COURT.—Yes, he said it seemed to him there was a fine streak of blue.

WITNESS.—Very fine, thread-like streak of blue in the bottom of the dent.

Mr. HAWKINS.—(Q.) What do you mean by a “fine streak of blue”?

A. Why, a fine blue line, is the only way I can describe it.

Q. You mean fine by being very indistinct?

A. Very light.

Q. And hard to see? A. Yes.

Q. So if it was discolored at all, it was very slight, is that it? A. Very slight, yes.

Q. You say you put your finger on the forehead?

A. I did.

Q. Did you feel of it there? A. I did.

Q. Was the skin loose, did it slip around when you worked it? A. No.

Q. Was it adhered to the bone?

A. It seemed to be, it was tight.

Q. It seemed to be adhered to the bone?

A. It did.

(Testimony of Ray J. Cool.)

Q. Your best judgment is that it was fastened to the bone?

A. As near as I could say, the way it felt.

Q. And did you work it around at all, Mr. Cool?

A. Why, I felt of it.

Q. You did what?

A. I felt of it; I felt of the skin at that place.

Q. When was this?

A. This was at home, on Monday morning.

Q. On Monday morning?     A. Yes.

Q. I thought you said a while ago that it was Sunday?     A. That is when I first noticed it.

The COURT.—He said that was when he first saw it at the undertaker's.

Mr. HAWKINS.—(Q.) Did you examine it at the undertaker's?     A. No, I just noticed it. [162]

Q. And you never made any examination until down at the house the next morning?

A. No, I never made no examination of it.

The COURT.—He means by examination, with your finger.

A. No, I never made any examination until it was taken to the house.

Mr. HAWKINS.—(Q.) And at that time you think you detected some slight lines of blue through there?     A. When I looked at it closely, yes.

Q. You had to look very closely to see those slight lines, did you?     A. Yes, it was very fine.

Q. Was the skin there a little bit softer than it was in other places?

A. Why, it seemed to be a little softer than it was

(Testimony of Ray J. Cool.)

any place else around close to there.

Q. There wasn't any line running up above the head; that is, a flesh line, as if the skin had been grown together, healing there?      A. No.

Q. Just perfectly smooth and soft?

A. Except for a dent.

Q. And you are quite satisfied that the skin at that particular place was fastened to the bone, so that it would not slip around?

A. My own decision, I could not say whether it was fastened to the bone or not, but it was firm or solid at that point.

Q. What do you mean by being solid or firm at that point.      A. Like it was stuck to something.

Q. Like it was stuck to something?      A. Yes.

Q. At that time had the body been embalmed by the undertakers?

A. It had been at the undertaking parlors, yes.

Q. It had been embalmed?

The COURT.—(Q.) Do you know whether it had been embalmed?

A. No, I don't know whether they had the body embalmed or not.

Mr. HAWKINS.—(Q.) Did you feel the body anywhere else?      A. No, I did not.

Q. Do you know the effect of embalming a body, as to making it so it may be indented by the pressure of the finger?

A. I didn't understand you.

The COURT.—(Q.) Do you know anything about the result of embalming a body at all?

(Testimony of A. A. Burke.)

A. No, I do not.

Mr. HAWKINS.—(Q.) What were you doing at the Neasham home?

A. I was attending the University of Nevada.

Mr. HAWKINS.—That is all. [163]

**Testimony of A. A. Burke, for Plaintiff (In Rebuttal).**

Mr. A. A. BURKE, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

Direct Examination.

(By Mr. KEPNER.)

Q. Where do you reside, Mr. Burke?

A. At the present time, in Carson City.

Q. What is your occupation?

A. At the present time I am employed by the Nevada Tax Commission.

Q. What has been your occupation during the past ten years?

A. Ten years ago I was special officer for Wells, Fargo & Company; and since that I have been chief of police in the city of Reno, sheriff of Washoe County, superintendent of state police in the State of Nevada, and inspector of state police. At the present time I am working for the Tax Commission.

Q. You say you were a special officer for Wells Fargo? A. Yes, sir.

Q. What were your duties? A. I was guard.

Q. How long were you chief of police of Reno?

A. A little less than four years, I think it lacked



(Testimony of A. A. Burke.)

about two months of being four years.

Q. During what dates?      A. 1907 to 1911.

Q. And for what term were you sheriff of Washoe County?      A. 1913 and 1914.

Q. What was your official position, if any, in February and March of 1915?

A. Superintendent of state police.

Q. Of the State of Nevada?      A. Yes, sir.

The COURT.—(Q.) February and March a year ago?      A. Yes, sir.

Mr. KEPNER.—(Q.) How long did you continue in that position, Mr. Burke?

A. About two months.

Q. And then what was your business.

A. Then I was inspector of the state police for about seven months.

Q. Were you inspector of the state police during the month of July, 1915?      A. Yes, sir.

Q. Do you remember the circumstance of the death of William C. Neasham?      A. Yes, sir.

Q. Did you know Mr. Neasham in his lifetime?

A. Yes, sir.

Q. As superintendent of the Nevada state police, did you make any investigation [164] of the circumstances surrounding the death of William C. Neasham?

Mr. HAWKINS.—When? I object to it unless it is located as to time.

Mr. KEPNER.—If he says he made any, I will fix the time.      A. Yes.

Q. If so, when?

(Testimony of A. A. Burke.)

The COURT.—When?

A. I was at the place designated to me as the one where Mr. Neasham's body was found on the—I think it was the 27th of February, 1915.

Mr. KEPNER.—(Q.) That would be the day of his death.

A. I am not positive whether it was that day or not, but I can tell by referring to a diary I carry, the exact date.

Q. Have you the diary with you?

A. I think so, yes, sir.

The COURT.—(Q.) The memorandum made at the time? A. Yes, sir.

The COURT.—You may refresh your memory from it.

(Witness produces diary.)

A. It was on the 28th of February that I made this investigation, on a Sunday.

Q. Mr. KEPNER.—(Q.) Where was that place that you visited?

A. I visited the place that is known as the oil pit, near the Nevada State Insane Asylum; it is about, I should say, a mile, or a little over, east of Reno.

Q. Were you present on or about the 30th of July, 1915, when Mr. Dann took some photographs of that location? A. I was.

Q. I will ask you to state whether there had been any change in the physical conditions of that oil pit and surroundings, between the time you first visited the oil pit on the 28th of February, and the time you were there with Mr. Dann, on the 30th of July, 1915?

(Testimony of A. A. Burke.)

A. There was no material changes, excepting the natural growth of grass that would naturally grow in July, and what you would find there in February, was all I could see.

Q. Any grass in that location?

A. Some alfalfa, and some grass that grows along the ditches. [165]

Q. No grass on the railroad track, was there?

A. No grass on the railroad track.

Q. Calling your attention to Plaintiff's Exhibit "D" for identification, I will ask you whether you were present when that photograph was made? (Handing exhibit to witness.) •

A. I can't say positively this is the photograph that was made at that time, but there was one that looked like that; it is an exact counterpart of it, if it is not the same one.

Q. Calling your attention to Plaintiff's Exhibits "E" and "F" for identification, were you present when those photographs were taken?

A. I was present on the 30th of July when photographs were taken like these. I was certainly present when one was taken.

The COURT.—One of them has the picture of a couple of handsome men, were you one of those?

A. I don't think, your Honor, I am one of the handsome men, but I see my photograph here.

Mr. KEPNER.—(Q.) Who is the other handsome man?

A. The other handsome man looks like Thomas Kepner.

(Testimony of A. A. Burke.)

Mr. KEPNER.—I ask that these photographs be marked respectively Plaintiff's Exhibits "D," "E" and "F."

(The three photographs are marked respectively Plaintiff's Exhibits "D," "E" and "F.")

Q. Did you see the body of William C. Neasham?

The COURT.—After his death?     A. Yes, sir.

Mr. KEPNER.—(Q.) Tell the Court what you observed.

The COURT.—When was it; find out when it was.

Mr. KEPNER.—(Q.) When did you see it?

A. I saw it on the 28th of February.

The COURT.—(Q.) You didn't see it the day that his body was brought in?

A. No, sir, not that day, I didn't see it until the next day—the next day after it was brought in. Assuming that it was brought in on the 27th, I saw the body on Sunday, the 28th.

Mr. KEPNER.—(Q.) What, if anything, did you observe in the way of wounds, or anything of that sort, in reference to the body?

A. Why, the undertaker showed me a wound in the mouth, by opening the mouth; that was all that I saw at that time. [166]

Q. Did you notice any other injuries of any character?     A. I did not.

Q. What examination did you make, Mr. Burke, of the so-called gravel-pit, shown in Plaintiff's Exhibit "D"?

A. I examined the ground about the place for tracks, or for any indications I might find of other



(Testimony of A. A. Burke.)

people having been there, or any indication I might find of a struggle having taken place there.

Mr. HAWKINS.—(Q.) That was on the 28th?

A. On the 28th.

Mr. HAWKINS.—I object to the question on the ground it is incompetent, irrelevant and immaterial, being a whole day after the occurrence happened there.

The COURT.—That only goes to its weight, not to its admissibility. You may argue to the jury all these things that suggest themselves to your mind as weakening the testimony, but that only goes to its effect, not to its admissibility.

Mr. HAWKINS.—I would like to object to it as incompetent, irrelevant and immaterial at the present time, and it not being shown that the condition on the 28th was the same as the condition on February 27th.

The COURT.—Objection overruled.

Mr. HAWKINS.—Exception for the reasons stated.

Mr. KEPNER.—(Q.) Calling your attention to Plaintiff's Exhibit "E," and to the portion of the exhibit where the two men appear to be standing, I will ask you where that point is with reference to the oil pit or gravel pit, where the body was found?

A. The point where the two men were standing here is north of the oil pit, and across the railroad track from that.

Q. How far is it, approximately, between those two points?

(Testimony of A. A. Burke.)

A. I should say it is a hundred and twenty-five feet.

Mr. HAWKINS.—(Q.) How far?

A. About a hundred to a hundred and twenty-five feet.

Mr. KEPNER.—(Q.) Did you make any examination of that place on the 28th of February?

A. Yes, sir.

Q. What did you observe?

Mr. HAWKINS.—I object to the question on the ground it is incompetent, irrelevant and immaterial, and it not being shown it was the [167] same place and the same condition that existed on the day of the event being inquired about.

The COURT.—He don't have to show that under circumstances such as these. The objection will be overruled.

Mr. HAWKINS.—We ask the benefit of an exception.

The COURT.—Answer the question: What did you observe at that place—you mean where the men are standing, don't you, or are shown to be standing in that photograph?

Mr. KEPNER.—Yes.

A. I observed tracks in the ground there; the ground was soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down.

Mr. KEPNER.—At this time, if your Honor

(Testimony of A. A. Burke.)

please, I will submit these photographs to the jury.

(The three photographs are shown to the jury.)

Mr. KEPNER.—You may cross-examine.

Cross-examination.

Mr. HAWKINS.—(Q.) I hand you the exhibits just referred to, and ask you to state which one you were referring to when you gave your last testimony about making an examination and what you found?

A. This is the one I referred to, and that is the place (indicating).

Mr. KEPNER.—(Q.) Which one is that?

A. This here, Exhibit “E.”

Mr. HAWKINS. — (Q.) Referring to Exhibit “E” and to the place where the men are shown therein, how far is that place from the sand pit, where the body of Mr. Neasham was found?

A. I should say about a hundred feet, maybe a hundred and twenty-five.

Q. In which direction? A. North.

Q. Which direction on this Exhibit “E”?

The COURT.—Well, he don’t mean which direction, he means which point on Exhibit “E”; the direction I suppose would be the same.

WITNESS.—Your Honor, that is the point that I have designated, that I have testified to as being the place where I examined for these tracks in soft ground. [168]

Q. That, you say, is north of the railroad?

A. That is north of what is known as the oil pit; it has been referred to here as the gravel and the sand pit, and I knew it as the oil pit.

(Testimony of A. A. Burke.)

Mr. HAWKINS.—(Q.) Now, will you designate on this Exhibit “E” the place where the pit is where the body of Mr. Neasham was found?

A. The pit was right in there. (Indicating on photograph.)

The COURT.—Just mark it with a cross, or with a “P,” or anything.

A. The pit would be right behind this pipe here; that pipe comes up out of the pit, right behind a pile of gravel that is there, sand and gravel. (Witness designates point on Exhibit “E” with a cross.)

Mr. HAWKINS.—(Q.) You have designated the place on Exhibit “E” where the pit was in which the body of Mr. Neasham was found, by a cross made with a lead pencil, which appears on top of a pile of material, and at the end of a line showing a pipe there, close to a house and some trees.

A. Yes; it is not close to the house; it is a long ways from the house, but the house shows in the photograph.

Q. And that point is across the railroad tracks from the point where you say you examined, and found some tracks in soft ground?

A. Yes, it is across the track; the pit is on the south side of the track, and this pit where I was examining the soft ground is on the north.

Q. Across the double or side-line track?

A. There is a main-line track and a siding there, it is across the double track.

Mr. HAWKINS.—I move to strike all the testi-



(Testimony of F. O. Chick.)

mony of the witness in reference to the examination made on February 28th, the day after the deceased was found there, and which examination was shown by the evidence to be from a hundred to a hundred and twenty-five feet from the place where the body was found, and across the railroad tracks, as being incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in the case.

The COURT.—The motion is denied.

Mr. HAWKINS.—Exception for the reasons stated. That is all. [169]

**Testimony of F. O. Chick, for Plaintiff (In Rebuttal).**

Mr. F. O. CHICK, called as a witness by plaintiff, in rebuttal, having been sworn, testified as follows:

Mr. KEPNER.—(Q.) Mr. Chick, you were on the stand this morning, and you are still under oath. Speaking of the scar which you noticed on the forehead of the deceased, and which you described this morning, I will get you to state whether that was caused in moving the body from the oil pit to your parlors?      A. It was not.

Mr. KEPNER.—That is all.

**Testimony of Mrs. Myrtle Raymond, for Plaintiff  
(In Rebuttal).**

Mrs. MYRTLE RAYMOND, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

Direct Examination.

(By Mr. KEPNER.)

Q. Where do you reside, Mrs. Raymond?

(Testimony of Mrs. Myrtle Raymond.)

A. At present in Sacramento.

Q. What is your maiden name?

A. Myrtle Neasham.

Q. You are a daughter of Mr. and Mrs. William C. Neasham?      A. I am.

Q. Where were you in February, 1915?

A. I was teaching in Galena district, Washoe County.

Q. Galena District, Washoe County?      A. Yes.

Q. Where were you on the 27th day of February?

A. I was out in the district where I was teaching.

Q. Did you see the body of your father after his death?      A. I did.

Q. Where and when?

A. On Sunday evening, February 28, as nearly as I can remember.

Q. At the undertaking parlors?      A. Yes.

Q. What did you observe with reference to wounds or scars, or depressions, or dents on the head?

A. The only thing unusual I noticed was a depression above the right eye, next to the hair in the forehead; I noticed it when I first looked at the body; I had never seen it before.

Q. Will you just describe that depression that you speak of.

A. As nearly as I can remember, it was about an inch and a half long, and I remember placing my little finger in it, and asking my brother who was standing beside me, if he had ever seen it before.

Mr. HAWKINS.—I move that be stricken out.  
[170]

(Testimony of Mrs. Myrtle Raymond.)

The COURT.—Yes; what you asked your brother is merely hearsay. What you said has nothing to do with it; it is simply what you saw and did.

Mr. KEPNER.—(Q.) Will you just indicate—you have a hat on, I will ask you to indicate on my forehead, the location of that dent.

A. As nearly as I can remember, right across there (indicating on counsel's forehead.)

Q. And what was the depth of it when you laid your finger in it?

A. It was about one-eighth of an inch deep, as nearly as I can remember, so I could place my finger in it.

Q. When you placed your finger in it, what portion of your finger was in the depression?

A. About to the second joint.

Q. And how deep?

A. How deep was the depression?

The COURT.—She said it was about a quarter of an inch deep.

WITNESS.—You mean how deep did I lay my finger?

Mr. KEPNER.—(Q.) How far did you lay your finger in the dent?

A. About a quarter of my finger, I should imagine.

Q. And you never had seen that before?

A. Never.

Q. When did you last see your father in his lifetime?

A. In San Francisco, on Monday evening—let's see; February 22d.

(Testimony of Mrs. Myrtle Raymond.)

The COURT.—(Q.) That was the week before?

A. That was five days before.

Mr. KEPNER.—(Q.) Who was down to San Francisco with you on that occasion?

Mr. HAWKINS.—I don't see how that is competent, your Honor, or rebuttal; I object to it on the ground it is immaterial.

The COURT.—Well, you have introduced evidence here which you claim might furnish a motive for self-destruction; now if they can show that the conditions surrounding this man's life immediately prior and up to the date of his death were such as to at least negative any incentive or motive for self-destruction, it has some bearing on the question; they are circumstances which go to this jury from which they will find what the fact is as to the issue that is to be submitted to them. Answer the question.

(The reporter reads the question.) [171]

A. My mother and my father, and my brother and Mr. Cool.

Mr. KEPNER.—(Q.) Which brother?

A. Edward.

Q. Did you all go there together, to San Francisco?

A. My mother and my father and I did; my brother and Mr. Cool went with a football team that was playing in California.

Q. What was the occasion of your going down there? A. The opening of the Exposition.

Q. The opening of the San Francisco Exposition?

A. Yes.



(Testimony of Mrs. Myrtle Raymond.)

Q. Do you know how long your father and mother were there at the Exposition?

A. We attended the opening of the Exposition on February 20th, and I was with them—that was Saturday, and I was with them until Monday evening, when I returned to Nevada.

Q. What was your father's conduct during that time? A. Very cheerful and happy.

Q. And your father and mother, what were their relations to each other during that time?

A. The best that could be imagined.

Q. What have been the relations between your father and mother as you have observed them?

A. Always since I can remember, as happy as possible.

Q. Always happy? A. Yes.

Mr. KEPNER.—You may cross-examine.

Cross-examination.

Mr. HAWKINS.—(Q.) Mrs. Raymond, you testified during the coroner's inquest, did you?

A. I did.

Q. I will ask you if at that time you were asked the following questions, and returned the following answers:

“Q. Did you know of any trouble that might have been troubling Mr. Neasham? A. Nothing definite; there are things that we think we can see, but nothing definite that we could seem to know that could put him into such a state. Q. Those were business worries? A. Yes.” Were you asked those questions, and did you return those answers?

(Testimony of Mrs. Myrtle Raymond.)

A. I don't remember a thing about it, at the present time I don't remember either the questions or the answers.

Q. You don't remember?      A. I don't remember.

The COURT.—When was the inquest held? [172]

Mr. HAWKINS.—March 1st, 1915.

The COURT.—That was a day or two after the death?

Mr. KEPNER.—That was the Monday following.

The COURT.—(Q.) Why do you mean you don't remember, were you in a state of distress?

A. I suppose that I was.

Mr. HAWKINS.—(Q.) Have you been talked with by plaintiff's attorney about this testimony that you gave before the coroner's inquest, or as reported to have been given by you before the coroner's inquest?      A. He—

Q. Just answer yes or no?      A. Yes.

Mr. HAWKINS.—That is all.

#### Redirect Examination.

Mr. KEPNER.—(Q.) What was the condition of your mother and the other members of the family at the time of the inquest?

Mr. HAWKINS.—I object to the question as incompetent, irrelevant and immaterial.

The COURT.—I don't see the materiality of that myself. Why?

Mr. KEPNER.—Simply to show the mental condition and mental strain and worry that they were under.

The COURT.—If they were under examination,

(Testimony of James Edward Neasham.)

and had given an answer such as the witness has here, that she didn't remember her testimony before the coroner's jury, the inquiry would be pertinent, because we all know circumstances like that are calculated to disturb the mental equilibrium of people, and they don't remember; but they are not under examination, it is only the witness here.

Mr. KEPNER.—That is all.

Mr. HAWKINS.—May I ask this question:—(Q.) You may have been asked those questions, and returned those answers? A. I may have.

Q. You simply don't remember. That is all.

Mr. KEPNER.—That is all. [173]

**Testimony of James Edward Neasham, for Plaintiff  
(In Rebuttal).**

Mr. JAMES EDWARD NEASHAM, called as a witness by plaintiff, in rebuttal, having been sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. You were on the stand the other day, Mr. Neasham? A. Yes, sir.

Q. And you are still under oath. Did you see the body of your father after his death? A. I did.

Q. When and where?

A. At my home, I think it was the following Monday.

Q. Did you see the body at the undertaking parlors? A. No.

Q. You saw the body at your home? A. Yes.

(Testimony of James Edward Neasham.)

Q. That would be on Monday following the day of his death?     A. Yes.

Q. What did you observe in the way of wounds on the body?

A. I noticed an unusual scar on his forehead.

Q. Just describe it.

A. It was about an inch and a half long and extending upward and backward, from about the center of the right side of the forehead, it extended back into the hair.

Q. How deep a depression was it?

A. About, oh, maybe three-sixteenths of an inch.

Q. And about an inch and a half long?

A. Yes, sir.

Q. You say that was an unusual scar, what do you mean by that?

A. Well, I had never noticed it before.

Q. Never had seen it before?     A. No.

Mr. KEPNER.—You may cross-examine.

Mr. HAWKINS.—No cross-examination.

**Testimony of Nicholas Curnow, for Plaintiff (In Rebuttal).**

Mr. NICHOLAS CURNOW, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. What is your name?

A. Nicholas Curnow.



(Testimony of Nicholas Curnow.)

Q. Did you know William C. Neasham in his lifetime?     A. Yes, sir.

Q. Was he any relation of yours?

A. Brother-in-law.

Q. Mrs. Neasham, the plaintiff in this suit, is your sister?     A. Yes, sir.

Q. How well did you know William C. Neasham in his lifetime?     A. How well? [174]

Q. Yes.

A. I knew him thoroughly, been with him for years, off and on.

Q. Did you ever cut his hair?     A. Yes, sir.

Q. How frequently?

A. One summer, I think it was 1913, I cut it every time it required cutting, all summer; and I cut it as early as 1894; frequently from that time, every time we were together.

Q. Then you cut his hair for twenty years, more or less?     A. That is off and on; yes, sir.

The COURT.—(Q.) I thought you cut his hair all one summer?

A. Yes.

Q. But you had cut it during a period of twenty years at different times?     A. Yes.

Mr. KEPNER.—(Q.) Where did you live during the summer of 1913?

A. At Buffalo Meadows.

Q. Was Mr. Neasham living at Buffalo Meadows during that time?     A. Most of the time, yes, sir.

Q. You were living there, too?     A. Yes.

Q. Where is Buffalo Meadows?

(Testimony of Nicholas Curnow.)

A. It is about one hundred and three miles due north of Reno, a ranch out there owned by Ward and Smith.

Q. Did Mr. Neasham have any scar on the right side of his forehead?     A. No, sir.

Q. Never did have a scar there?

A. Speak a little louder; I am hard of hearing.

The COURT.—He asked you if Mr. Neasham had a scar you had ever observed on the right side of his forehead?     A. He had not, no, sir.

Mr. HAWKINS.—Just a minute. I want to object to the question as incompetent, irrelevant and immaterial, and move the answer be stricken.

The COURT.—You may consider the objection was interposed before the answer. What is the objection?

Mr. HAWKINS.—On the ground it is immaterial in this record, under the pleadings and under the proof made by plaintiff, as to how the deceased came to his death; it does not prove or tend to prove any issue.

The COURT.—The objection is overruled. It has a bearing; if the [175] jury find that this injury never existed there before, they have a right to take it into consideration in determining the manner of the deceased's death.

Mr. HAWKINS.—Exception.

Mr. KEPNER.—(Q.) Did you see the body after death?     A. No, sir.

Q. Have you had any experience with firearms?

A. Yes, sir.

(Testimony of Nicholas Curnow.)

Q. Familiar with the workings of the Savage automatic pistol?      A. I am—all automatics.

The COURT.—(Q.) All automatics?

A. All automatics made in the United States.

Mr. KEPNER.—(Q.) Is it possible to fire a Savage automatic pistol if it is in proper working order, and leave a shell in the chamber?      A. It is not.

Mr. HAWKINS.—I object to the question on the ground there is nothing in the record in reference to it, no bearing on it, and incompetent, irrelevant and immaterial.

The COURT.—What do you claim as to the relevancy of it?

Mr. KEPNER.—Why, there is a contradiction of the record, if the Court please; at the inquest Mr. Ferrell's testimony was that there was a shell in the chamber and that the safety was on the trigger; to-day he testified differently.

Mr. HAWKINS.—Mr. Ferrell testified that he never gave any such testimony.

The COURT.—The mere asking him of those questions from a purported record, don't make that record verity, nor introduce it in evidence, but they have a perfect right by verifying that as the evidence given at the coroner's inquest to introduce it here in rebuttal of the witness' statement, because that is one of the most usual and ordinary methods of impeachment, to show that at some time the witness has made statements inconsistent with his present testimony. I will let the answer stand.

Mr. KEPNER.—(Q.) Now I will get you to state,

(Testimony of Nicholas Curnow.)

Mr. Curnow, whether it is possible to fire a Savage automatic pistol with the safety on?

Mr. HAWKINS.—Same objection.

The COURT.—Answer the question. [176]

A. It is not; it is impossible to fire it with the safety on with the gun in perfect working order.

Mr. KEPNER.—That is all.

Cross-examination.

Mr. HAWKINS.—(Q.) You say you are a relative of Mrs. Neasham? A. Yes, sir.

Q. A brother? A. Brother to Mrs. Neasham.

Q. And you have known Mr. Neasham how long?

A. How is that?

Q. How long did you know Mr. Neasham?

A. Mr. Neasham?

Q. Yes.

A. I think it was '93 or '94—'93, I think it was.

Q. When was he married to your sister?

A. I wasn't present at the marriage; I think it was in '91.

Q. Do you remember the time that Mr. Neasham had a team run away with him?

A. I might have heard about it, but I wasn't present at the time it happened.

Q. And one of his children was killed in the runaway? A. Oh, that was no runaway.

Mr. KEPNER.—I object to that, if the Court please.

The COURT.—How is that?

A. That was no runaway.



(Testimony of Nicholas Curnow.)

Mr. HAWKINS.—(Q.) That happened in connection with a team, didn't it? A. How is that?

The COURT.—The witness is a little hard of hearing; you will have to speak up a little.

Mr. HAWKINS.—(Q.) That circumstance happened with Mr. Neasham in connection with a team?

Mr. KEPNER.—Which circumstance?

Mr. HAWKINS.—The team ran away.

WITNESS.—You want to know if the team killed the little girl?

Q. I want to know about that event; yes.

A. I think it did happen that way; I wasn't present at the time.

Q. When was that?

A. That is impossible for me to say, just the date.

Mr. KEPNER.—Your best recollection will do.

A. Along in 1906 or 1907, somewhere along there, wasn't it. I ain't [177] sure just when it was.

The COURT.—What is the idea of examining a witness who wasn't present and knows nothing about it?

Mr. HAWKINS.—If he doesn't know he can say so.

The COURT.—He has told you so.

Mr. HAWKINS.—(Q.) Do you know whether Mr. Neasham was injured in that matter or not?

A. He was not.

Q. Do you know of another occurrence where he was injured in connection with a team?

A. No. The only injury I know that he received with a horse, a horse struck him, and cut him here

(Testimony of Nicholas Curnow.)

under the lip; he had a scar there from being struck by a horse.

Q. When did he get that injury?

A. That was before I knew him; he informed me that was the way he got the scar there.

Mr. HAWKINS.—That is all.

Mr. KEPNER.—That is all. If your Honor please, I offer in evidence lines 15 to 28, inclusive, page 7, of the duly authenticated transcript of proceedings entitled “In the Matter of the Inquisition Upon the Body of William C. Neasham, Deceased,” which under the statute, was filed in the office of the clerk of the Second Judicial Court of the State of Nevada, in and for the County of Washoe, and by him duly certified as being a true and correct copy of that transcript; the matter referred to being a portion of the testimony of Charles P. Ferrell, given at the inquest.

Mr. HAWKINS.—I object to the offer on the ground it is not signed by the witness; and on the further ground it is incompetent, irrelevant and immaterial.

The COURT.—This is simply for the purpose of impeachment, I suppose?

Mr. KEPNER.—That is all.

The COURT.—You may read that part that relates to the testimony you offer; it is only those parts you asked him about, and it is purely for impeachment. Gentlemen of the jury, you will bear in mind, if I should neglect to state to you when I come to charge you, that this evidence is not introduced as

(Testimony of Nicholas Curnow.)

being the truth of what may have been there represented, but simply as bearing upon the question whether the [178] witness under examination has at some other time testified differently from what he testified here; that is the only purpose; it is for the purpose as we term it in law, of impeachment; in other words, to lay before a jury so that they may determine how far a witness is to be believed, because that is their province.

Mr. HAWKINS.—Your Honor overrules the objection?

The COURT.—Yes.

Mr. HAWKINS.—I desire an exception.

Mr. KEPNER.—I read the portion of the testimony of Charles P. Ferrell appearing on page 7 of the transcript, beginning with line 15: (Reads:) “Q. By Mr. Lunsford: Did you take the gun? A. Yes, sir, I picked the gun up. Q. It is here now? A. Yes, sir. This is the gun. Q. Is this in the same condition as it was? A. No; I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger. I took the shell out of the chamber, and there is nine in the magazine. Q. You have the empty cartridge now? A. Yes.”

Mr. KEPNER.—That is the portion which I read to the witness, your Honor.

**Testimony of W. J. Harris, for Plaintiff  
(In Rebuttal).**

Mr. W. J. HARRIS, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. Mr. Harris, where do you live?      A. Reno.

Q. What is your occupation?

A. Vice-president and cashier of the Farmers & Merchants' National Bank.

Q. How long have you been in that position approximately; were you occupying that position in February, 1915?

A. Oh, yes, since about 1903.

Q. Did you know William C. Neasham in his lifetime?      A. I did.

Q. How well did you know him?

A. Well, I would meet him occasionally, as he had business in the bank. [179]

Q. Did he have an account at your bank, a checking account?      A. Yes, sir.

Q. What was the condition of the account on February 27th, 1915?

A. (Producing memorandum.) He had a credit balance in the bank on that date of \$844.06.

Q. That amount was subject to check, was it?

A. Yes, sir.

Q. When did you last see Mr. Neasham in his lifetime?      A. It was the day before his death.



(Testimony of W. J. Harris.)

Q. And what was his manner and appearance at that time?

A. Perfectly normal, the same as he had always been.

Q. You noticed nothing unusual in his manner or appearance? A. Nothing whatever.

Mr. KEPNER.—Cross-examine.

Cross-examination.

Mr. HAWKINS.—(Q.) Was or not Mr. Neasham indebted to your bank on February 27th, 1915?

A. Yes, sir.

Q. In what sum?

A. We had a mortgage on his ranch of fifteen thousand dollars.

Q. The bank held a note and mortgage on the ranch for the sum of fifteen thousand dollars?

A. Yes, sir.

Mr. HAWKINS.—That is all.

Redirect Examination.

Mr. KEPNER.—(Q.) When was that loan made, Mr. Harris, what was the date of it?

A. It was not due; it was dated June 23d, 1914, and due June 23d, 1916.

The COURT.—(Q.) The present year?

A. The present year; yes, sir.

Mr. KEPNER.—(Q.) Then there was nothing due from William C. Neasham to the bank on February 27th, 1915?

A. No, sir. I will state further to the question of Mr. Hawkins, he owned another note at that time,

(Testimony of W. J. Harris.)

secured by an assignment of a chattel mortgage, that has since been paid; but on this ranch mortgage, fifteen thousand dollars, not due until June of this year.

Mr. KEPNER.—I think that is all. [180]

Recross-examination.

Mr. HAWKINS.—(Q.) What was the amount of that other indebtedness which you speak of?

A. \$3,250.00.

Q. You say that has since been paid?

A. Yes, sir.

Q. Paid since the death of Mr. Neasham?

A. Yes, sir; it was secured by—

Mr. HAWKINS.—That is all.

Mr. KEPNER.—I submit the witness can finish his answer.

Mr. HAWKINS.—Certainly, if he wishes to.

The COURT.—Proceed.

WITNESS.—This other loan was an assignment of a chattel mortgage that he had upon some sheep, secured by double the amount; and when it was due it was promptly taken up.

The COURT.—(Q.) It was not a chattel mortgage given by him, then? A. No.

Mr. HAWKINS.—(Q.) As I understand, the bank had loaned him money, and he had secured it by an assignment of this chattel mortgage?

A. We held him responsible, as well as another.

The COURT.—(Q.) It was another's debt?

A. It was another's debt, secured by double the amount.

(Testimony of W. J. Harris.)

By the COURT.—(Q.) Mr. Harris, what is the habit of your bank as to loans on country real estate, about what percentage would you loan?

A. Fifty per cent.

Q. And do you know of your own knowledge whether or not this mortgage on Mr. Neasham's ranch represented about the same proportion of value?

A. Yes, sir, our committee appraised it at about thirty thousand dollars.

Q. The ranch was worth about thirty thousand dollars?      A. Yes.

Q. As far as his relations with you, the obligation he owed you, he was not what you would call insolvent?

A. Not by any means; no, sir.

Mr. HAWKINS.—(Q.) Do you know whether that real estate has been sold since Mr. Neasham's death or not.

A. It has not been sold; no, sir.

Mr. HAWKINS.—That is all.

Mr. KEPNER.—That is all. [181]

**Testimony of Harry B. Wood, for Plaintiff  
(In Rebuttal).**

Mr. HARRY B. WOOD, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

Direct Examination.

(By Mr. KEPNER.)

Q. Where do you reside, Mr. Wood?

(Testimony of Harry B. Wood.)

A. In Reno.

Q. What is your occupation?

A. Life insurance agent.

Q. For what company?      A. New York Life.

Q. Did you have anything to do with writing the insurance on Mr. Neasham's life?

A. In a sense, I did; yes, sir.

Q. What was it?

A. I obtained certain information about Mr. Neasham, which made me suppose that it would—

Mr. HAWKINS.—I object to that.

The COURT.—Just state what you did.

A. Supposing it were possible to write some insurance for Mr. Neasham, and being at that time in sort of a partnership with a man who came up here from San Francisco to work with me, he and I went to see Mr. Neasham; this Mr. Pearson, however, completed the transaction with Mr. Neasham, and sold him a ten thousand dollar life insurance policy early in July of 1914.

The COURT.—(Q.) Do you mean you approached Mr. Neasham in the matter?

A. I did not, I took this other man to him.

Q. I mean that the approach was from the insurance side, he didn't seek the insurance?

A. Absolutely so; yes, sir.

Mr. KEPNER.—(Q.) Look at the document which I hand you, which is marked Plaintiff's Exhibit "B"—

Mr. HAWKINS.—We will admit that is the policy that was referred to.



(Testimony of Brewster Adams.)

Mr. KEPNER.—The policy that was written as a result of his negotiations in the matter?

Mr. HAWKINS.—As a result of Mr. Pearson's negotiations.

Mr. KEPNER.—All right. That is all.

Mr. HAWKINS.—No cross-examination. [182]

**Testimony of Brewster Adams, for Plaintiff  
(In Rebuttal).**

Mr. BREWSTER ADAMS, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. What is your name? A. Brewster Adams.

Q. Where do you live? A. In Reno.

Q. What is your occupation? A. Clergyman.

Q. Of what denomination? A. Baptist church.

Q. How long have you been in Reno, Mr. Adams?

A. Seven years, approximately.

Q. Did you know William C. Neasham in his lifetime? A. I did.

Q. Are you acquainted with Mrs. Neasham, plaintiff in this action? A. Yes, sir.

Q. How long had you been acquainted with the Neasham family prior to February 27th, 1915?

A. Why, I should say approximately three or four years I have known them.

Q. How intimately acquainted were you with the Neasham family?

A. I think quite intimately; the children attended

(Testimony of Brewster Adams.)

our Sunday school, and the family attended our church somewhat, and I visited at the home of Mr. Neasham, and I knew him; he was a member of the same order I was, and I often saw him in the lodge, and I felt I was very well acquainted with him.

Q. Did you ever stay overnight at the Neasham house?

A. I stayed at the ranch-house at Buffalo Meadows.

Q. How frequently?

A. I simply went out there for a hunting trip, and stayed there, I think it was two nights, at their home.

Q. When was that?

A. It was three years ago, it will be three years this summer.

Q. Three years this summer?      A. Yes.

Q. That would be during the summer of 1913?

A. Yes.

Q. State what the treatment of William C. Neasham for his family was as you observed it, and what their treatment of and regard for him was, as you observed it.

A. Well, I always have felt that Mr. Neasham's family— [183]

Mr. HAWKINS.—I object to the feeling of the witness.

The COURT.—It is a form of expression of the witness to express what he deemed the relations.

WITNESS.—Well, I have thought—that is better.

Mr. HAWKINS.—I will object to that as not responsive to the question.

(Testimony of Brewster Adams.)

The COURT.—Counsel does not wish you to think; just state your judgment of their relations from what you saw.

A. My judgment of the family was that it was a perfect family life in every sense I have ever seen; Mr. Neasham's regard for his family was very—

Mr. HAWKINS.—I object to that as a conclusion of the witness.

The COURT.—(Q.) Well, you mean from his manner?

A. Well, if I could give facts; I know that Mr. Neasham when I would see him when his family was away, was always talking about them; he bought an automobile and took his family away out to Buffalo Meadows—told me that he could not live without them.

Mr. HAWKINS.—I object to that; I don't think that is proper.

The COURT.—No, I would not tell anything he told you; it is not competent unless it was told you in the presence of the Insurance Company, I think.

WITNESS.—This is quite a considerable Insurance Company—it may be.

Mr. KEPNER.—Proceed.

The COURT.—I think he has finished.

Mr. KEPNER.—Had he finished?

The COURT.—He told you what his judgment was from his knowledge of them, as to the relation of the family; that is all you can call for.

Mr. KEPNER.—(Q.) Anything else that you observed as to their relations to each other?

(Testimony of Thomas H. Curnow.)

A. Always friendly, all that I have ever seen.

Mr. KEPNER.—That is all.

Mr. HAWKINS.—(Q.) The relations existing between Mr. Neasham and his family were friendly, as far as you know?     A. Absolutely, yes, sir.

Mr. HAWKINS.—That is all.

(The Court admonishes the jury, and an adjournment is taken until Friday, March 9th, 1916, at 10 o'clock A. M.)     [184]

Friday, March 9th, 1916.

Court convened—10 o'clock A. M.

(All parties present.)

**Testimony of Thomas H. Curnow, for Plaintiff  
(In Rebuttal).**

Mr. THOMAS H. CURNOW, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. Where do you reside, Mr. Curnow?

A. In Reno, Nevada.

Q. What is your business?     A. Merchant.

Q. Whereabouts?

A. 223 Virginia Street, Reno.

Q. What relation are you to the plaintiff in this action?     A. I am a brother.

Q. Did you know William C. Neasham in his lifetime?     A. I did.

Q. How long had you known him?

A. About twenty-five or six years.



(Testimony of Thomas H. Curnow.)

Q. Where were you on the 27th day of February, 1915? A. In my place of business in Reno.

Q. Did you see the body of William C. Neasham on that date? A. I did.

Q. Whereabouts?

A. At the Perkins-Gulling undertaking parlors.

Q. Will you state how soon after it was brought to the undertaking parlors?

A. Possibly half or three-quarters of an hour.

Q. Were you there when Doctor Gibson was there?

A. I was.

Q. Were you there when he performed what he called an autopsy?

A. No, I wasn't there at that time.

Q. Were you there before that? A. Yes.

Q. State what you observed on the body at that time with reference to wounds, or dents, or bruises, or anything of that sort.

A. Well, I saw on his right forehead, just about the hair-line, was a dent, apparently the size of a lead pencil, or a little larger, and possibly two inches to three inches long, and right in the bottom of this dent there was a blue mark, looked like coagulated blood under the skin.

Mr. HAWKINS.—I object to the statement as to what it looked like, and move it be stricken.

The COURT.—No, that is his statement of what it looked like, that is always a question of fact—how did it look to you? [185]

Mr. KEPNER.—(Q.) Just indicate on your fore-

(Testimony of Thomas H. Curnow.)

head, Mr. Curnow, the location of that mark?

A. Right along, from right along about that location. (Indicates on forehead.)

Mr. HAWKINS.—(Q.) Will you indicate that so it will go in the record, state it in words.

A. It ran from the upper forehead toward the ear, along close to the hair line.

Mr. KEPNER.—(Q.) Did you ever observe that mark before? A. I never did.

Mr. KEPNER.—Cross-examine.

Mr. HAWKINS.—(Q.) Was that a scar which you saw there at that time, Mr. Curnow?

A. It was not a scar; no, it was a denture.

Q. What?

A. It was just an indenture, bruised in.

Mr. HAWKINS.—That is all.

**Testimony of Dr. J. A. Ascher, for Plaintiff  
(In Rebuttal).**

Doctor J. A. ASCHER, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. Your name is J. A. Ascher? A. It is.

Q. You are a doctor? A. Yes, sir.

Q. You live at Sparks? A. Yes, sir.

Q. How long have you been a doctor?

A. It will be nineteen years, about this time—just about nineteen years.

Q. Did you know William C. Neasham in his lifetime? A. I did.

(Testimony of Dr. J. A. Ascher.)

Q. Did you see his body after his death?

A. I did.

Q. Where and when?

A. At his home, I think the day after his death, I am not positive—it was at his home.

The COURT.—It is conceded that he died on Saturday, the 27th day of February, 1915, and the evidence tends to show that the body was not taken to his home from the undertakers until Monday, I think.

Mr. KEPNER.—Yes.

Q. So it was after the body had been taken home that you saw it?

A. It was; it was a day of two afterwards, I don't remember the time.

Q. By a day or two afterwards, you mean a day or two after his death? A. Yes. [186]

Q. Did you observe anything unusual in the appearance of the body?

A. I did not, until my attention was called to certain things.

Q. What was your attention called to?

A. My attention was called to a bruise or scar in the forehead on the left side.

Q. Did you express an opinion at that time?

Mr. HAWKINS.—I object as incompetent, irrelevant and immaterial.

The COURT.—Yes, the objection is good. You can ask him what he saw, and what his judgment was as a surgeon and physician, but not what opinion he expressed.

Mr. KEPNER.—(Q.) What was your judgment,

(Testimony of Dr. J. A. Ascher.)

Doctor, from what you observed, especially with reference to this dent on the forehead, as to the force of the blow which would have produced a dent of that character?

Mr. HAWKINS.—I object to the question on the ground it is incompetent, irrelevant and immaterial.

The COURT.—I think the inquiry here is his judgment as to whether or not it was of recent origin—the appearance that he saw there. If it was of recent origin, then you may be permitted to ask him what in his judgment would produce such an injury.

Mr. KEPNER.—I think, if your Honor please, we have sufficiently shown that the dent was of recent origin.

The COURT.—You have not shown it by this witness.

Mr. KEPNER.—Not by this witness, no; and I don't know that I can show it by this witness; that is not the purpose for which this witness was called; the purpose for which I called this witness was to show, assuming that the dent was of recent origin, what would be the cause of it.

The COURT.—Oh, that is a different thing.

Mr. KEPNER.—(Q.) Doctor, assuming that the dent to which your attention was called was of recent origin, assuming that it had been caused on the day of the death of the deceased, and before his death, what, in your judgment, would have been the force of the blow which caused that dent?

Mr. HAWKINS.—I object to that on the ground it is admitted by the pleadings, and the plaintiff's



(Testimony of Dr. J. A. Ascher.)

proof has established the fact, that the death was caused by a gunshot wound. [187]

The COURT.—Where the defense is suicide or self-destruction, and it is admitted that the immediate cause of death was a wound in the throat, it would be for the jury to determine whether it was a gunshot or something else; the Court would not be permitted to tell them it was a gunshot wound, that is for them to find; but it not being disclosed by any positive evidence of any one present at the time the death took place what caused it, they are permitted to show all the surrounding circumstances as bearing upon the question whether this wound that produced death was self-inflicted, or whether it was received in some encounter with a third party. You may answer the question.

(By direction the reporter reads the question.)

A. Considerable force was exerted.

The COURT.—Describe it more particularly, Doctor, this indent, as they call it, or wound, or whatever you may designate it, describe its appearance, and state then what sort of an instrument might have produced it.

A. At that particular time—if you will allow me to explain a little without answering yes or no, and so forth—at that particular time I did not presume that I would ever be called as a witness; in my capacity as a physician I see, of course, a number of injuries, and I didn't take any particular note of it; I noticed that it was an indentation, or a wound that when it was produced had required considerable force to produce it.

(Testimony of Dr. J. A. Ascher.)

Q. You didn't notice about its recent character?

A. It was impossible for me to say at that time whether it was of recent origin or not. A wound that is produced, and death follows shortly after, or immediately, will not take on the same characteristics as another wound.

Q. That is what I wanted to get at.

A. But as my attention was called to it, and I was asked if I had ever noticed it before, as a family physician of the family, coming in close contact with Mr. Neasham over a period of eleven years, I will say that I never noticed such a scar or a wound before.

Q. It was of an appearance which would have required something of a [188] blow, you say, to produce it?

A. It appeared that way to me, of probably more or less of a blunt instrument.

Mr. KEPNER.—(Q.) Would the blow which caused the mark have been sufficient in your judgment, to have rendered a man unconscious; in other words, would it have been sufficient to have knocked him out, or knocked him down?

A. Yes, I think so.

Mr. KEPNER.—You may cross-examine.

Cross-examination.

Mr. HAWKINS.—(Q.) Doctor, you refer to this place over the eye as a scar or wound of some kind, just tell us what appeared there?

A. Because of the reasons that I have just given, I not expecting to be called as a witness, and other reasons, I stated I did not take any particular note of

(Testimony of Dr. J. A. Ascher.)

it, except to look at it, and probably felt of it, but I didn't examine it carefully, nor thought of ever having to describe that wound at some time in the future, consequently I cannot.

Q. The body had been embalmed when you saw it?

A. I presume it had.

Q. You didn't notice this, as I understand you, until some one called your attention to it there at the house?      A. I did not.

Q. And after that you didn't pay sufficient attention to it to be able to describe it at this time?

A. I simply looked at it, and possible felt of it, but paid no particular attention to it.

The COURT.—(Q.) Was the body in the casket at that time?      A. Yes, it was.

Mr. HAWKINS.—(Q.) Was there any discoloration there, black and blue at that time?

A. I do not remember.

Q. The scar at the place you have referred to could have been received in many different ways, could it not?      A. I presume so.

Q. In a struggle with a horse, or in a runaway with a wagon, or a fall, or in innumerable ways?

Mr. KEPNER.—That is objected to, if the Court please.

The COURT.—I think it is entirely proper for them to show how it might have been received. While the evidence introduced by you, Mr. Kepner, tends to show that this wound, or whatever it was,—abrasion or indent on the skull of the deceased, had never been noticed there before, [189] the jury are entitled to

(Testimony of Dr. J. A. Ascher.)

have all the circumstances, including its appearance, and everything else, and the judgment of an expert like the doctor, as to its appearance, and as to the manner in which it might have been made, to enable them to say whether or no it might have been produced on another occasion, because its only materiality is tending to throw light on the question as to how the deceased came to his death.

WITNESS.—It might have been produced in innumerable ways—it might have been.

Mr. HAWKINS.—(Q.) In your acquaintance with Mr. Neasham, do you remember about his being injured a number of years ago in a runaway by a horse?

The COURT.—You mean Mr. Neasham, the deceased?

Mr. HAWKINS.—Yes.

A. I have some recollection of such an occurrence.

Q. Do you remember whether or not at that time he received a scalp wound?

A. I am rather sure he did not; he sustained simply some minor injury that did not leave much impression upon my mind.

Q. Doctor, is it common or possible for a party to receive a wound which makes a scar, which practically becomes invisible during lifetime?

Q. Why, all scars necessarily, to a large extent, have a tendency to become invisible in course of time, yes.

Q. What is the general character in color of the skin over, across and immediately next to a scar, what tendency has the color to be?



(Testimony of Dr. J. A. Ascher.)

A. It depends upon the nature and the extent of your scar; a small scar, that would become wholly invisible—it depends upon the nature and the extent of the scar.

The COURT.—(Q.) I suppose, Doctor, it is a matter of common knowledge, and is especially known to your profession, that some scars will, depending upon the manner in which they have been made, form a more or less prominent cicatrix upon the surface, and others will leave a furrow?

A. Yes; it depends upon the nature and extent, upon the treatment, the various ways of healing, and numerous things of that kind, that have got to be taken into consideration.

Mr. HAWKINS.—(Q.) Is it a fact that they sometimes become a white [190] line—the skin there is lighter in color than that adjacent to it?

A. Some scars.

Q. Doctor, if Mr. Neasham had received a blow on the forehead, on the 27th of February, which would cause a depression, or this mark that you say you saw, would it or not have caused a discoloration there?

A. If death had followed immediately afterward, it would be less apt to; the circulation of the blood stopping, there would be less tendency to have any discoloration, or possibly any at all, as the circulation of the blood is stopped, and the extravasation through the tissues, if death had taken place immediately, or a short time afterward, why, possibly not.

The COURT.—(Q.) The blood is withdrawn from the more or less remote parts or members of the body

(Testimony of Dr. J. A. Ascher.)

almost immediately on death, is it not?

A. Well, the blood ceases to circulate, of course, and there is not the extravasation in the tissues.

Mr. HAWKINS.—(Q.) What causes the discoloration when the body receives a blow, Doctor?

A. Usually a rupture of the capillaries, and the blood extravasating through the tissues.

Q. If this mark was caused by a blow, was it of sufficient force to destroy or break those capillaries, and cause the blood to come out? A. Possibly.

Q. You say possibly?

A. Yes; I don't know the exact amount of force which it would require.

Q. How much force would it take to hit a man on the forehead and break the capillaries, so as to make a black and blue place?

A. It depends somewhat upon the place a man is hit; for instance, we know discoloration of the—

Q. (Intg.) I mean this particular place you have described.

A. There would not be nearly so much tendency there as in other parts of the body.

Mr. HAWKINS.—I move the answer be stricken as not responsive.

The COURT.—I think the answer is quite responsive.

(By direction the reporter reads the question and answer.)

Mr. HAWKINS.—I submit it is not an answer to the force at all. [191]

The COURT.—It can only be answered in the com-

(Testimony of Dr. J. A. Ascher.)

parative manner in which the witness has answered it. The exact amount of force, of course common reason teaches, cannot be known in the abstract that would be necessary to produce a given condition under all circumstances.

Mr. HAWKINS.—(Q.) Doctor, I will ask you this: If a blow administered on the forehead, where you have referred to this scar, or mark, was sufficient to knock Mr. Neasham down, would that blow have been sufficient to break the capillaries, and cause a discoloration at that place?

A. Not necessarily; if you will permit me, I will tell you why; simply because there is very little tendency to discoloration by any kind of a blow on the scalp.

Q. Are not there capillaries in the scalp at this particular place where you located this scar and injury? A. Not as many as in other parts.

Mr. HAWKINS.—Will you answer the question? I move the answer be stricken as not responsive to the question.

WITNESS.—There are capillaries, certainly, in all parts of the body.

Q. Are the capillaries in the scalp, and at the place where you have located this scar, or wound, any more difficult to break than they are in other parts of the body—to break by a blow? A. Yes.

Q. They are more difficult to break? A. Yes.

Q. Why?

A. Because of the nature of the tissue, and because of the hair protecting the scalp, you might say—and

(Testimony of Dr. J. A. Ascher.)

because of the nature of the tissue.

Q. Was this mark up in the hair?

A. It was right at the hair line, as I remember it; the hair could have been very easily down.

Q. So that the hair protected?

A. I say it could have been, I don't know whether it did or not.

Q. How long does it take a scar to form, Doctor?

Mr. KEPNER.—Well, in what kind of a wound?

Mr. HAWKINS.—I am talking about a scar.

WITNESS.—That all depends, Mr. Hawkins.

Q. Well, what is the shortest time within which a scar may be formed? [192]

A. I cannot answer that definitely, I don't know. What kind of a scar?

Q. Any wound that leaves a scar, a permanent scar?

A. It is a matter, I should say of several weeks, probably, for what we call an ordinary scar; it depends upon the way it has healed, and the time in which it has healed, and numerous other things; a scar may form in probably a week; it is not a firm, cicatricial tissue, because it constitutes—

The COURT.—(Intg.) (Q.) Well, a scar as we commonly know it, is simply the result and effect and remains of some injury or sore after it has healed, isn't it? A. Yes.

Mr. HAWKINS.—(Q.) I was just going to ask you what constitutes a scar. What makes a scar, Doctor?



(Testimony of Dr. J. A. Ascher.)

A. Well, it is the so-called cicatricial tissue that makes a scar.

Q. A fibrous tissue working in to build up and heal the broken or wounded place? A. Yes.

Q. Now, what is the color of a scar as it progresses in its formation and complete healing?

A. An ordinary scar at first is red in color, and gradually fades out, takes on more or less of the appearance of the surrounding skin, unless it is an extensive scar, and then some of them remain red—if it is extensive.

Q. And when in its period or history of a scar does it become and have the whitish color?

A. It varies upon the size of it.

Q. Now, relatively with the redness which you have mentioned as coming first, about when would the whiteness appear, and about how long?

A. Gradually; it may cover a period of several years, and gradually it may fade out.

Q. Then a scar would be evidence of an old injury, or an injury of some time standing, is that true?

A. A scar would be evidence of an injury, yes.

Q. And it would of necessity be of some, say two weeks' standing at least, before it would be a scar?

The COURT.—I think this has gone far enough.

Mr. HAWKINS.—Very well, your Honor, that is all. [193]

#### Redirect Examination.

Mr. KEPNER.—(Q.) Doctor, assuming that Mr. Neasham was struck over the head with some blunt instrument, a blow of sufficient force to cause the dent

(Testimony of Dr. J. A. Ascher.)

or depression in his forehead which you have referred to; that he was knocked down, and that immediately by some injury in his throat the blood vessels in the interior and back part of his throat were severed so that he bled profusely from the nose and mouth, could you state whether or not the dent or depression in his forehead would be discolored?

Mr. HAWKINS.—I object to the question.

The COURT.—Oh, I think that has been covered by the evidence of the witnesses.

Mr. KEPNER.—It has partially been covered, your Honor, but not in full.

The COURT.—Well, he has testified, and it is something that all have more or less knowledge of, that immediately upon death circulation is arrested, and the active tendency of the blood therefore to gather, or extravasate, as the Doctor has expressed it, is withdrawn. Now that condition must of necessity be exaggerated where there is profuse bleeding,—loss of blood; would not that be true, Doctor?

WITNESS.—Yes, Judge, it would.

The COURT.—I would not spend any more time on that; it is in large part speculation.

Mr. KEPNER.—That is all.

Mr. HAWKINS.—(Q.) Where is the blood, in the vessels or the tissues?

The COURT.—I don't care to go into matters of that kind. You may put your own doctor on, if you want to, that is, if it is proper surrebuttal, but I don't want to have this witness go into that. [194]

**Testimony of Verdi Peterson, for Plaintiff  
(In Rebuttal).**

Mr. VERDI PETERSON, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

Direct Examination.

(By Mr. KEPNER.)

Q. Where do you reside, Mr. Peterson?

A. Reno, Nevada.

Q. What is your occupation?      A. Laborer.

Q. Where were you on the 27th day of February, 1915?      A. In Reno.

Q. Did you know William C. Neasham in his lifetime?      A. Yes, sir.

Q. How long had you known him?

A. Well, more than twenty years.

Q. More than twenty years?      A. Yes, sir.

Q. Did you meet him on the morning of the 27th of February?

A. I met him in the latter part of the month, I would not swear that it was the 27th or the 28th.

The COURT.—(Q.) Well, can you fix it with reference to his death; was it the same day that he died?

A. Yes, sir.

Q. Well, that is what he is asking.      A. Yes, sir.

Mr. KEPNER.—(Q.) You met him on the morning he died?      A. Yes.

Q. What time in the morning?

A. Well, somewhere between eight and nine o'clock.

Q. Nine o'clock?

(Testimony of Verdi Peterson.)

A. As near as I can remember.

Q. In the morning?      A. In the morning.

Q. Whereabouts?

A. On the corner of Virginia Street and Commercial Row.

Q. What was his manner and appearance?

A. Happy; contented; never saw him happier in my life than he was that morning.

Q. Did you have any conversation with him?

A. Yes, sir.

Q. How long were you there together?

A. We were there probably four or five minutes.

Q. Where was this point that you met him—where did you meet?

A. Where we met—on the corner of Virginia Street and Commercial Row.

Q. When you separated which direction did he go?

A. He went to the Overland Hotel, as he told me he was going.

Mr. HAWKINS.—I didn't catch that.

WITNESS.—To the Overland Hotel, and I went to the postoffice—separated on the corner. [195]

Mr. KEPNER.—(Q.) He told you he was going to the Overland, and he went in that direction?

A. Yes, sir.

Q. Did he say anything else to you before you separated?      A. Yes, sir.

Q. What was it?

Mr. HAWKINS.—Object to that as incompetent, irrelevant and immaterial.

The COURT.—What is the purpose?



(Testimony of Verdi Peterson.)

Mr. KEPNER.—Simply to show the frame of mind the man was in when he was last seen alive at nine o'clock in the morning, an hour before he died.

The COURT.—I don't think that would be admissible. You may show by acquaintances under such circumstances that a party involved was seen very recently, and that he appeared to be in his usual frame of mind and carried his usual manner, did not look distraught, or anything of that kind, but what he says has nothing to do with it, unless it is a declaration tending to show some disposition on his part to commit the act which it is sought to prove he did, then the other side might prove that; but statements that he made that had nothing to do with the purpose are not admissible.

Mr. KEPNER.—(Q.) You later heard of the death of William Neasham, did you? A. Yes, sir.

Q. How long after your meeting on the corner?

A. I should judge probably from one hour to one hour and a half, or thereabouts; something before ten o'clock, as near as I remember.

Q. You think you heard it about ten o'clock?

A. Somewheres about there.

Q. Did you go to the undertaking parlors?

A. Yes, sir.

Q. See the body?

A. Yes, sir; I did; of course, I didn't believe the report, when I heard it on the street.

Mr. HAWKINS.—I move that answer be stricken.

Mr. KEPNER.—I have no objection. You may cross-examine.

Mr. HAWKINS.—No cross-examination. [196]

**Testimony of Mrs. May Kepner, for Plaintiff  
(In Rebuttal).**

Mrs. MAY KEPNER, called as a witness by plaintiff, in rebuttal, after being sworn, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. What is your name?      A. May Kepner.

Q. What is your husband's name?

A. Thomas E. Kepner.

Q. What is your relation to Mrs. Neasham?

A. I am her sister.

Q. Did you know Mr. Neasham, the husband of the plaintiff?      A. I did.

Q. How long had you known Mr. Neasham?

A. I knew Mr. Neasham about twenty-six years—I think about twenty-six years ago since I met him.

Q. Would you frequently visit your sister's home?

A. I did.

Q. How frequently?

A. Oh, sometimes every day every week; the last two or three years since she has been living in town, I was with her a great deal.

Q. State what Mr. Neasham's treatment of and regard for his wife and children was, as you observed it; and what their treatment of and regard for him was, as you observed it?

Mr. HAWKINS.—If the Court please, I object; I don't see how that is material, competent or relevant; it does not tend to prove or disprove any issue.

The COURT.—Well, that same idea occurred to me yesterday, but you permitted evidence to go in in

answer to precisely the same question. I thought probably you regarded it as bearing upon the question as to whether there existed any inducing cause for suicide, growing out of unpleasant domestic relations, or something of that kind. You don't claim that at all?

Mr. HAWKINS.—No, sir; we haven't suggested it at all; I didn't object, because I didn't care at that time, but I don't see why it should be continued.

Mr. KEPNER.—As I understand the situation, it is this, your Honor: Where the defense in an action of this kind is suicide, even though the domestic relations of the parties have not been attacked or assailed, nevertheless it is competent in rebuttal to show circumstances from which the jury might draw an inference against suicide—to show that he had a good home, that he had a wife and children, and that he lived happily [197] with them.

The COURT.—I think you are correct about that. I think in rebutting the assertion of suicide, you may show all the surrounding circumstances, and the absence of those things which would tend to give cause or motive for taking one's life; but it seems to me you have all you want in the concession of the other side, that they don't claim there was any such condition.

Mr. KEPNER.—That may be true at this point, but it was not true at the time I called the witness and asked the question. That is all, Mrs. Kepner.

**Testimony of Mrs. Matilda C. Neasham, in Her Own  
Behalf (In Rebuttal).**

Mrs. MATILDA C. NEASHAM, the plaintiff, called as a witness in rebuttal, testified as follows:

**Direct Examination.**

(By Mr. KEPNER.)

Q. Calling your attention to the day before your husband died, I will ask you whether or not Mr. Neasham was interested in the National Mine in Humboldt County?

Mr. HAWKINS.—Objected to as incompetent, irrelevant and immaterial, and not rebuttal evidence.

The COURT.—What is the purpose of this?

Mr. KEPNER.—The purpose is to show that a message was received that evening which was very cheerful, and which had a—

Mr. HAWKINS.—I would rather not—

The COURT.—I am asking counsel to tell me the materiality of this, and he is answering it.

Mr. HAWKINS.—May I suggest that he may tell just what this witness is going to tell, in the presence of the jury.

The COURT.—Certainly he may; but it is not evidence unless it is permitted to go in.

Mr. HAWKINS.—It will go to the jury just the same.

The COURT.—I assume, and I think you will find the jury is of enough intelligence to distinguish between a mere statement of counsel, and the evidence in the case. State what it is so I may rule on it.

Mr. KEPNER.—That he was interested in the



(Testimony of Mrs. Matilda C. Neasham.)

National Mines, and that [198] evening, Friday evening before his death, a message was received which tended to, and did give, both Mr. Neasham and his wife a great deal of pleasure.

The COURT.—I think I will exclude that. Gentlemen of the jury, I hardly think, looking at you as a lot of intelligent men, that it is necessary for me to suggest that nothing is evidence that is not admitted by the Court from the witness-stand; the mere statements of counsel, of course, are not evidence, they are not evidence at all, and they are not to be regarded by you, excepting in so far as they are based upon the evidence. I never have any fear of permitting matters to be stated before an intelligent jury, because they are able to discriminate between the evidence in the case and what is stated as mere matters of procedure in the trial.

Mr. KEPNER.—(Q.) After your husband died, I will ask you whether anything, any article which he usually carried on his person, was missing, if so what was it?

Mr. HAWKINS.—I object to the question.

The COURT.—You may answer.

Mr. HAWKINS.—May I state an objection to that, if the Court please? There is nothing here to show that he had this article on him at any particular time.

The COURT.—The question is, that he usually carried; that is all.

Mr. HAWKINS.—I would like an exception to the ruling, if the Court please.

(By direction the reporter reads the question.)

(Testimony of Mrs. Matilda C. Neasham.)

WITNESS.—Am I to answer?

Mr. KEPNER.—Yes.

A. The check-book that he used for his ward, Ray J. Cool, was missing, and he always carried it with his own book in the same pocket.

Mr. HAWKINS.—I move the answer be stricken as incompetent, irrelevant and immaterial; and does not tend to prove or disprove any of the issues.

The COURT.—Let it go out; it hasn't any materiality.

Mr. KEPNER.—I will state to the Court that is simply a preliminary [199] question.

The COURT.—What is the purpose?

Mr. KEPNER.—The purpose is to show that this check-book which Mr. Neasham usually carried in his pocket, a subsequent question will disclose the fact that he usually signed a number of checks in blank, and that the last time the witness saw the check-book, which was the day before he died, there were several blank checks signed in the book.

The COURT.—Well, what of it?

Mr. KEPNER.—Now, that book having disappeared at the time of his death might be a circumstance from which the jury could draw an inference as to whether he died by his own act, or by the hand of another.

The COURT.—Do you propose to follow it up by showing any checks were subsequently presented?

Mr. KEPNER.—No, I do not.

The COURT.—Objection sustained.

Mr. HAWKINS.—No cross-examination.

(Testimony of Mrs. Matilda C. Neasham.)

Mr. KEPNER.—If your Honor please, at this time, and in connection with the testimony of the witness Frank Collins, your Honor will remember that you asked the witness a number of questions as to the statute, and the requirements of the statute; I would like to ask your Honor to read sections 6465 and 6467 of the Revised Laws, and if your Honor deems it necessary I will read it to the jury. The purpose is to contradict the statement of Mr. Collins, and to discredit the witness.

The COURT.—This is a regulation such as I asked the witness if it did not exist in this State?

Mr. KEPNER.—And he denied that it did exist—denied that it required him to make any report.

(The Court reads the statute referred to by counsel.)

The COURT.—This is the usual police regulation provided by the statute, which I imagined did exist; the witness evidently did not seem to know it.

Mr. KEPNER.—Your Honor has read it, so it will not be necessary for me to read it again.

The COURT.—Oh, it is a matter of law. [200]

Mr. KEPNER.—Plaintiff rests.

Mr. HAWKINS.—Defendant has no further evidence. If the Court please, at this time on behalf of the defendant, I desire to interpose two motions:

Comes now the defendant, New York Life Insurance Company, by its attorneys, at the conclusion of all the evidence offered by both parties in the case, and moves the Court to direct a verdict, and to instruct the jury to return a verdict, for the defendant

upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of Ten Thousand Dollars as the amount of the insurance under said contract, Exhibit "A" to the complaint filed here. Said motion is made upon the grounds and for the reasons as follows, to wit:

1st. That under the pleadings and evidence in this case, and the law applicable thereto, there is no liability against the defendant company, and the defendant is not indebted to the plaintiff in the said sum of Ten Thousand Dollars.

2d. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit "A" attached to and made a part of the complaint.

3d. That it appears from the record in this cause:

(a) That "in the event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more."

(b) That the first insurance year under said contract Exhibit "A" to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

(c) That said insured, William C. Neasham, during said first insurance year, and on to wit, February 27th, 1915, committed self-destruction by a gunshot wound self-inflicted.

4th. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insur-



ance was not Ten Thousand Dollars, and under the [201] terms of said contract, Exhibit "A" to the complaint, the plaintiff is not entitled to recover said sum of Ten Thousand Dollars, or any other sum or amount greater than a sum equal to the premium on said contract or policy, Exhibit "A" to the complaint, which has been paid to and received by the company. And it appears from the record herein, and is admitted, that the premium on said contract or policy, Exhibit "A" to the complaint, was the sum of \$456.00, and no more.

The COURT.—It was distinctly stated yesterday that unless the jury found plaintiff to be entitled to recover the whole amount of the policy, plaintiff disclaims and waives any right to recover any premium that may have been paid, so it lays that out of consideration.

(Discussion.)

The COURT.—It is sufficient for me to say now that the evidence in the case is such as to preclude me from taking the case from the jury. The rule, in this circuit particularly, is very stringent that no case must be withdrawn from the consideration of the jury, which has the right under the law, to find the facts, if in the judgment of the Court, a deduction may be drawn from the evidence by a reasonable mind, at variance with the theory upon which the motion was based. So I will deny your motion, and let the cause proceed to the jury.

Mr. HAWKINS.—Your Honor will give us an exception?

The COURT.—Oh, yes.

Mr. HAWKINS.—For the reasons stated in the motion:

1st. That under the pleadings and evidence in this case, and the law applicable thereto, there is no liability, against the defendant company, and the defendant is not indebted to the plaintiff in the sum of Ten Thousand Dollars.

2d. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit "A" attached to and made a part of the complaint.

3d. That it appears from the record in this cause:

(a) That "in the event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more."  
[202]

(b) That the first insurance year under said contract Exhibit "A" to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

(c) That said insured, William C. Neasham, during said first insurance year, and on to wit, February 27th, 1915, committed self-destruction by a gunshot wound self-inflicted.

4th. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insurance was not Ten Thousand Dollars, and under the terms of said contract, Exhibit "A" to the complaint, the plaintiff is not entitled to recover said sum of Ten Thousand Dollars, or any other sum or amount

greater than a sum equal to the premium on said contract or policy, Exhibit "A" to the complaint, which has been paid to and received by the company. And it appears from the record herein, and is admitted, that the premium on said contract or policy, Exhibit "A" to the complaint, was the sum of \$456.00, and no more.

Thereupon, the defendant requested the Court to give to the jury the following instructions:

1.

The jury are instructed that under the evidence in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of Ten Thousand Dollars as the amount of the insurance under said contract, Exhibit "A" to the complaint herein. You are therefore instructed to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover a judgment of Ten Thousand Dollars as to the amount of the insurance under said contract, Exhibit "A" to the complaint herein.

2.

The jury are instructed that under the facts in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, and you are instructed to return a verdict for the defendant. [203]

At the conclusion of the argument, the Court instructed the jury as follows:

The COURT.—Gentlemen of the jury, I will ask your attention for a few moments while I proceed to submit to you the principles of law in this case, which must govern you in your deliberations in arriving at a verdict; the evidence and argument having been submitted, this alone is necessary for your guidance in your deliberations when you retire to your jury-room.

You have all understood long since that this is an action brought to recover upon a policy of life insurance issued to the deceased, William C. Neasham, in an amount for the sum of Ten Thousand Dollars. In the course the cause has taken, there is left but one main issue for your determination in order to reach a verdict.

The policy which has been read to you contains a provision in these words: “In the event of self-destruction during the first insurance year”—that means the first insurance year on the policy—“whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more.”

This provision means that in the event stated, the company shall be relieved of all liability to pay the amount of the insurance on the life, in this instance Ten Thousand Dollars, but shall only be required to repay to the beneficiary under the policy any moneys which may have been paid it in the way of premiums thereon. This is a perfectly valid provision of the policy, and being a part of the contract made by the deceased, is binding upon the benefi-



ciary under the policy. The beneficiary under the policy is the party to whom it is provided the insurance is to be paid in the event of death—in this instance the plaintiff here.

The defense interposed by the defendant is that the deceased, William C. Neasham, the party insured under the policy, violated this provision of the policy by voluntarily and intentionally taking his own life during the first insurance year under the policy, and that by reason of that fact the defendant is wholly exempted and relieved from any liability to pay the amount for which his life was insured. [204]

It is also denied that any premium has ever been paid to the defendant, and therefore it is under no liability to pay anything under the policy in any amount.

As to this second feature of the defense, it is removed from your consideration—as I have suggested to you once before to-day—and rendered immaterial by reason of the fact that plaintiff has disclaimed and waived any right to recover whatsoever, unless found by the jury to be entitled to recover the whole amount covered by the policy; and the defendant concedes that notwithstanding the alleged nonpayment of premium, the policy was in force at the death of the insured, unless found by you to be avoided by the manner of his death.

The evidence shows without conflict, and in fact it is admitted, that the death of the insured occurred during the first year of the existence of the policy; and the main issue, therefore, which I have referred

to is as to the manner of that death, since, under the evidence in the case, the plaintiff has made out her cause of action entitling her to recover the stipulated amount of insurance, unless that right is found by you to have been defeated by the act of the deceased in taking his own life.

If the insured died from any other cause than self-destruction, plaintiff must recover. If he took his own life, whether sane or insane, the verdict must be for the defendant.

The defense of self-destruction or suicide, which for present purposes means the same thing, is an affirmative defense, and the burden of proving it rests upon the defendant who asserts it. Suicide or self-destruction, being at variance with the ordinary human instincts, and involving a wrongful act, is never to be presumed, but must be proved or established by evidence sufficiently satisfactory to overcome the presumption against it, and to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of the death of the person involved other than that of self-destruction. The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to overcome the presumption of the innocence of the deceased of the wrong [205] involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, rather than accident, mischance, or violent injury inflicted at the hands of another.

The term "self-destruction" used in this policy

and understood in the law, does not necessarily cover and include every instance in which a man dies as a result of his own act. The term means, and is intended to mean, and is meant to express the instance where the act which produces death is done intentionally, and with the deliberate purpose of producing death. In other words, self-destruction contemplates a union or joint operation of act and intent. It is the intent with which the act is done which distinguishes it from death resulting from accident or negligence. If one is handling a deadly weapon or other instrumentality, in a negligent and careless manner, and as a result is accidentally killed, in such an instance, although death results from his own act, it is not self-destruction or suicide such as to excuse a defendant's liability, for the intent is absent. In such case it is what is denominated an accidental death. Whereas, if the same act be done intentionally, with the purpose of taking his life, it is self-destruction in the sense in which that term is used in the policy. While the person whose act is concerned must be conscious of the fact that the act he does is dangerous and may produce death, it is not necessary under such a provision as that involved here, in order to relieve the insurer, that the person taking his life be conscious of the moral quality or consequence of his act, but only that he know that the means he employs will cause, or is calculated to cause, death or danger to his life.

The fact of self-destruction, like any other fact in a civil case not requiring some specific mode of

proof, may be shown by circumstantial evidence, but the circumstances as the basis of such fact should, like any other character of evidence, be such as to exclude with reasonable certainty, as I have indicated, any other theory or cause to account for the death of the person involved.

Applying these principles to the evidence in this case, if the jury find that the act of shooting was done by the deceased, that it was done intentionally, and with the purpose of taking his own life, [206] then, as I have said, whether he was at the time sane or insane, the plaintiff cannot recover. If, on the other hand, the jury find that the shooting was done by the deceased, but that it was done accidentally, or was the result of carelessness, and without the intent or purpose of taking his life, then under the evidence, the plaintiff will be entitled to a verdict. And, of course, should you find that the shot which killed the deceased was fired by some third person, then and in that event the plaintiff will be entitled to your verdict.

If you find for the plaintiff, she will be entitled to a verdict at your hands for the amount stipulated in the policy, Ten Thousand Dollars, together with interest thereon at the legal rate of seven per cent per annum from the date she furnished defendant the proofs of death, which was March 15th, 1915, down to the date of your verdict. This interest should be computed by you, and added to the principal of Ten Thousand Dollars, and inserted in your verdict as a total or lump sum; you do not express the two items separately.



Should you find for the defendant, then your verdict must simply be a declaration to that effect.

Now, gentlemen of the jury, these are what may be termed the more specific principles applicable to this case, because they cover the particular nature of the cause of action asserted. There are certain general principles, however, which should be stated to you.

While it is the duty of the Court to state the law to the jury and equally their duty to observe it in their deliberations upon the evidence, it is solely the function and right of the jury to pass upon the evidence, to say what it shows. You find the facts, with that the Court has nothing whatsoever to do; and it is neither its privilege nor its purpose to have the jury influenced in any wise by ideas they may gather from its expressions made during the trial in ruling upon evidence, or in any other way, that would be calculated to influence the minds of the jury.

The burden of finding the facts and reaching a verdict in a case of this kind, rests on you, and you cannot shift it to the Court; and if you have gathered from anything uttered by the Court throughout this [207] trial any idea as to its views as to the facts in this case, you must discard them from your minds, and rest your verdict solely and alone upon the result of your own deliberations, wholly unbiased by anything that you may have heard from the bench.

There have been one or two motions made during the trial which called for suggestions at the hands of the Court as to various contentions of counsel as to what was shown in this case. Whatever was said by

the Court in those instances was said solely with reference to the particular question of law involved at the time, and was intended in no respect to indicate to this jury what the idea of the Court was as to what the verdict should be.

Now, you are necessarily the judges of the credibility of the witnesses in this case, because that is involved inseparably with the determination of the facts. You must say how far you will believe any witness that has appeared upon the stand, that means according to him the credibility to which he is entitled. A witness goes upon the witness-stand, and you observe his manner of testifying just exactly as you would observe the manner of a man that met you upon the street, who entered in conversation with you, and was proceeding to relate to you something of a nature which he was desirous of having you believe. You note his manner, you note the nature of what he says, how far it appears to be intrinsically true, or how far it seems to be at variance with other facts disclosed to you by the evidence; whether he appears to make his statements from the stand in a frank, candid and open manner; or, on the other hand, apparently equivocates—forgets, that very ready suggestion of one who is not always ready to be frank and open; and you make up your minds from those things; and from any apparent interest he may manifest in the case, either bias in favor of one side, or prejudice against the other; and determine what degree of credibility you will accord to him.

Now, under the law, every witness that goes upon

the stand is accorded the presumption that he will tell the truth; but this does not mean, of course, that a witness will always tell the truth; and it does not mean that the jury is always bound to believe that he is telling [208] the truth. You apply the tests that I have indicated, and such others as appeal to your judgment, and you say whether he is telling the truth; and you are not required to enforce this presumption unless the evidence of the witness accords with your judgment as to the truth. All this presumption means is, that a witness going upon the stand and telling a story probable in itself, and as to which there appears nothing to call it into question, and nothing to impeach his credibility in any way, you are not permitted arbitrarily to say you will not believe that witness; you are to presume that he is telling the truth. But you are not bound to believe every witness who appears upon the stand, no matter how positively and strongly he may testify, if you are satisfied from his manner, or the matter to which he testifies, that it is not in all respects the truth.

Now, because a witness says that he has forgotten, or because a witness may make statements which you are satisfied are at variance with the truth, if, in your judgment, those statements are made simply as the result of mistake, while they may make you more careful in examining his evidence to see how far you will believe it, it does not require you necessarily to discard his evidence entirely. But if a witness has testified to a fact upon the stand, which you believe to have been stated deliberately and for the purpose of deceiving you, and you believe it to be false, then

you have a right to discard all of the evidence of that witness. You are not called upon to believe it to any extent, excepting just so far as it is supported in your judgment by other evidence in the case, which you do believe.

Now, that is passing upon the credibility of the witnesses; and from the sum and substance of the evidence of these various witnesses, you make up your mind as to what the facts are involved in the issues as to which those witnesses have testified.

I think it is hardly necessary for me to suggest to a body of men as intelligent as you appear, that what has been suggested to you in argument is perfectly correct; that is, that your verdict in a case of this kind must be based upon the evidence in the case, and upon nothing else. No considerations of mere sympathy on the one hand or prejudice [209] upon the other, must find a reflection in the verdict of an honest jury. You are to take the evidence and pass upon it, and reach your verdict unbiased to any such considerations. You have a right in examining the evidence to any enlightenment which you may receive at the hands of counsel through their arguments. That is one of the methods of laying before the minds of the jury the views of those who are employed to represent the respective parties as to their theories of what the evidence shows. You are entitled to receive those views, and to apply them in your consideration of the evidence, but only to the extent that you find that they tend to enlighten you; you are not bound at all by the suggestions of counsel, if you find in any respect they transgress the



strict lines of the evidence; nor are you bound to act upon a theory advanced by either counsel. You are permitted, if you see fit, to base your verdict upon a theory wholly separate and apart from that advanced by either counsel, under any circumstances appearing in the evidence which will warrant such a theory. Any theory which underlies the verdict of a jury must be supported by evidence in the case. All I intend by this suggestion to you is, that if in your examination of this evidence you conclude you cannot account for the death of this deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with some other theory which you believe the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment.

Under the Federal system your verdict must be unanimous; you are not permitted to find a verdict by a less number, as you are under the State system. Under the State system, you may find a verdict by less than the entire twelve, but you cannot do so under the Federal statute.

I think that comprises all I deem it necessary to say to you gentlemen. The clerk, I presume, has prepared the forms of verdict, and you will find them to meet the necessities I have suggested in the form of your verdict.

Mr. HAWKINS.—May I make a suggestion as to the charge—as to the interest of the witnesses in the result of the suit, who have testified. [210]

The COURT.—Yes, that is a proper suggestion.

You have a right to take into consideration in passing upon the credibility of a witness, the fact that it appears the witness has an interest in the case; and you may measure to what extent, in your judgment, under all the circumstances, that fact may tend to color the evidence of a witness, or induce a deviation from the strict truth. That is simply another one of the tests that you apply to the evidence of witnesses in determining their credibility. Do counsel desire to take any exceptions?

Mr. KEPNER.—I would like to make a suggestion to your Honor. Possibly I had better come up to the desk.

The COURT.—No, make any suggestions you see fit.

Mr. KEPNER.—If your Honor please, in outlining the circumstances under which the jury might find a verdict, your Honor proceeded to state if they found it was by the act of the deceased, intentionally; and then what the effect would be if they found it was by the act of the deceased without any intention; and then your Honor stated if it was by the act of a third party, and so on. I suggest to your Honor that if the jury is in doubt, and unable to say by whom the act was committed, then they should find for the plaintiff.

The COURT.—Well, that is covered by the charge of the Court when it instructs the jury that the evidence must enable them to find that the death was the result of self-destruction, or of course the plaintiff would be entitled to recover.

The burden, gentlemen of the jury, being upon the

defendant to establish its affirmative defense that this death was the result of self-destruction, it follows, as I have heretofore suggested to you—perhaps counsel didn't notice it—that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, if it leaves you in doubt, then of course the defendant will not have sustained the burden of proof by a preponderance of the evidence, and your verdict will necessarily be for the plaintiff.

Mr. KEPNER.—That is all, your Honor.

Mr. HAWKINS.—If the Court please, in order to continue my theory in this matter, I desire to have the record show certain exceptions to your Honor's charge. [211]

First, we desire an exception to all that part of the charge which says that the plaintiff has made a *prima facie* case, and that the burden is on the defendant to establish by a preponderance of the evidence, self-destruction.

Second, we desire an exception, and do except to the charge in all parts where it incorporated the question of an accident, in that there is no evidence tending to establish accident, or no contention by the plaintiff, in that under the pleadings there is an affirmative statement that the deceased came to his death by a gunshot wound at the hands of some person or persons other than plaintiff.

We desire to except to all that part of the charge which incorporates the question of intention. I believe that is all.

Thereupon the jury at 3:20 o'clock P. M. retired to consider of their verdict, and at 5:10 o'clock P. M. returned into court.

The COURT.—Gentlemen, have you agreed upon a verdict?

JUROR.—Your Honor, we have not.

The COURT.—What is your desire?

JUROR.—We desire to have read the transcript of sheriff Ferrell's evidence before the coroner's jury.

The COURT.—That was read during his examination?

JUROR.—Yes, sir, and taken in evidence. And we want to hear read ex-Sheriff Burke's testimony before this jury.

The COURT.—The entire testimony?

JUROR.—Yes.

The COURT.—You are supposed to pay attention to the evidence. If there is some particular evidence you wish to have read, but to read the transcript of the entire evidence—

JUROR.—There seems to be a question between several jurors' memory in this.

The COURT.—Some particular point?

JUROR.—We would like to have ex-Sheriff Burke's evidence read as to the tracks he testified to having found on the railroad.

Thereupon the reporter reads the following testimony.



C. P. FERRELL.

“Mr. KEPNER.—(Q.) Did you testify at the coroner’s inquest in Reno on [212] the occasion when you say you delivered this gun to Mr. Unsworth?      A. I did.

Q. And you were asked about this gun at that time?      A. I was.

Q. I will get you to state whether you were asked this question by the district attorney: ‘Q. Did you take the gun?’ to which you answered, ‘Yes, I picked the gun up.’      A. I did.

Q. Then you produced the gun; and then you were asked this question, referring to this same pistol: ‘Is this in the same condition as it was?’ to which you answered, ‘No, I removed the shell from the chamber, and there are nine shells in the magazine.’

A. Well, you are getting two questions together.

Q. The question and your answer. The question: ‘Is this in the same condition as it was?’ to which you answered: ‘No, I removed the shell from the chamber, and there are nine shells in the magazine.’ Did you so testify?

A. It is compounded in two questions.

Q. Now the question was repeated: ‘Q. Is it in the same condition?

A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber and there is nine in the magazine.’ Did you so testify?

A. No, sir, I did not. I will explain my testimony.

Q. Now did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger?     A. I did not."

A. A. BURKE.

"Q. What examination did you make, Mr. Burke, of the so-called gravel pit, shown in Plaintiff's Exhibit 'D'?

A. I examined the ground about the place for tracks, or for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there.

Q. Did you make any examination of that place on the 28th of February?     A. Yes, sir.

Q. What did you observe?

A. I observed tracks in the ground there; the ground was a soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down." [213]

The COURT.—Is there anything else, gentlemen?

JUROR.—Acting in a capacity in which I have never been placed before, I would like to know if it is proper to arrive at a verdict entirely through a secret ballot, or by an open ballot?

The COURT.—The jury determines their method of arriving at a verdict. I will say the very purpose of having an aggregate body of men on a jury is that the parties shall have the benefit of the united judgments of those men, and it is proper, and expected, that the jury will discuss the evidence

among themselves, reach their conclusions from the evidence, agree upon such manner as they may see fit to express their votes, and vote accordingly; whether you vote secretly or whether you vote openly rests with you.

JUROR.—If your Honor please, we are satisfied as to what we wanted.

Mr. HAWKINS.—If the Court please, before the jury retires, I want to make a suggestion. This testimony of Mr. Burke's that was read was fixed as on the 28th, the day after whatever occurred there transpired.

The COURT.—The jury are supposed to remember everything excepting what they ask to have their memory refreshed upon.

Thereupon the jury at 5:20 o'clock P. M. again retired to consider of their verdict, and at 6:10 P. M. returned into court with the following verdict:

“We, the jury in the above-entitled case, find for the plaintiff in the sum of \$10,689.30.

Dated, March 10th, 1916.

J. S. MITCHELL,  
Foreman.” [214]

I, A. F. Torreyson, Reporter in the United States District Court for the District of Nevada, DO HEREBY CERTIFY:

That as such reporter I took *verbatim* shorthand notes of the testimony and proceedings in said court on the trial of the case of Matilda C. Neasham, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant, on March 6th, 8th and 9th,

1916, and that the foregoing transcript, consisting of pages 1 to 206, inclusive, contains a full, true and correct transcription of my shorthand notes of the testimony given and proceedings had on said trial.

Dated Carson City, Nevada, June 14th, 1916.

A. F. TORREYSON.

(Revenue Stamp—Ten Cents.) [215]



**Plaintiff's Exhibit "A"—Policy of Insurance.**

NEW YORK

LIFE

INSURANCE COMPANY

By This Policy of Insurance Agrees to Pay

\*\*\* TEN THOUSAND \*\*\* Dollars

at the Home Office of the Company in the City and State of New York to Matilda C., wife of the insured \*\*\*\*, Beneficiary, (with \*\* the right on the part of the Insured to change the Beneficiary as hereinafter provided) upon receipt at said Home Office of due proof of the death during the continuance of this contract, of \*\*\* WILLIAM C. NEASHAM \*\*\* the Insured.

This insurance is granted in consideration of the payment of the first premium

of \*\* Four hundred fifty-six 90/100 \*\*\* Dollars the receipt of which is hereby acknowledged, constituting payment for the period terminating on the Tenth day of July in the year Nineteen Hundred and fifteen and the payment of a like sum on said date and on the Tenth \*\* day of July \*\* in every year thereafter during the continuance of this Policy until the death of the Insured.

This policy is free of conditions as to residence, travel, occupation, or military or naval service, and shall be incontestable after one year from its date of issue except for nonpayment of premium. After its delivery to and receipt by the Insured this Policy

Date Policy  
Takes Effect

takes effect as of the Tenth day of July Nineteen Hundred and fourteen.

The benefits and provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the NEW-YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Twenty-third day of July, Nineteen Hundred and fourteen.

Examined  
W.  
D.  
O. L.  
913-1

DARWIN P. KINGSLEY,  
President.

SEYMOUR M. BALLARD,  
Secretary.

Age 48.

\_\_\_\_\_,  
Registrar.

Insurance Payable at Death: Premiums Payable  
During Life: Annual Dividend.

\* \* \* \* \*

SELF-DESTRUCTION.—In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more.

**Plaintiff's Exhibit "B"—Statements.**

**Claimant's Statement No. 1—Proof of Death.**

**PROOFS OF DEATH.**

**CLAIMANT'S STATEMENT No. 1.**

(Before making out this Statement, read carefully the Special Instructions on the other side.)

1. No. of policy, 4,707,986.
2. Name of deceased in full.
3. Residence: a. When policy was issued. b. At time of death.
4. When was residence last changed?
5. Occupation: a. When policy was issued. b. At time of death.
6. Date of birth.
7. Place of birth.
8. State the source from which date of birth was obtained.

Note.—The Family Record, Certificate of Birth, or other writings should be referred to.

9. a. Place of death. b. Date of death.
10. Name and residence of every physician who attended deceased during the year prior to death.
11. In what other companies and for what amounts was life of deceased insured?
12. In what capacity, or by what title, do you claim this insurance?
13. What was your age at your last birthday?

Dated at Reno, Nevada, this 15th day of March, 1915.

Date of Policy, July 23, 1914—in effect from July 10th, 1914. Amount, 456.90.

~~\$10,000.00~~

William C. Neasham:

a. 607 North Virginia Street, Reno, Washoe County, State of Nevada.

b. Same.

Oct. 18, 1912.

a. Rancher and Stockman.

b. Rancher and Stockman.

November 13th, 1866.

California.

From family record. Mar. 22, 1915.

a. Near Reno, Washoe County, Nevada.

b. February 27, 1915.

Our family physician is Dr. J. A. Ascher, of Sparks; no knowledge of Mr. Neasham consulting physician during past year.

Woodmen of the World, Certificate No. 75292, Washoe Camp No. 407. Amount, \$3,000.

William C. Neasham was my husband and I am the Beneficiary named in said Policy.

41.

Dated at Reno, Nevada, this 15th day of March, 1915.

Signature: MATILDA C. NEASHAM,

Postoffice Address: 607 N. Va. St., Reno, Nev.



**Physician's Statement No. 2—Proof of Death.**

NOTE.—This Statement must be entirely in the handwriting of the Physician.

**PROOFS OF DEATH.****PHYSICIAN'S STATEMENT No 2.**

(Before making out this Statement, read carefully the Special Instructions on the other side.)

1. Name of deceased in full.
2. How long had you known deceased?
3. Where did deceased reside at time of death?
4. What was deceased former residence?
5. What have been deceased several occupations to your knowledge?
6. What was the age at death?
7. State as accurately as you can the following facts in regard to deceased's personal appearance:
  - a. Place of death.
  - b. Date of death.
8. How long had you been the medical attendant or adviser of deceased?
  - a. For what diseases did you treat or advise deceased prior to last illness?
  - b. Give date, duration and result of each.
    - a. What disease was the immediate cause of death?
    - b. How long, in your opinion, did deceased suffer from this disease?
      - a. From what other important diseases, if any, did deceased suffer?
      - b. Give, as nearly as you can, the duration of each one.
9. When were you first consulted by deceased, or by any relative or friend, for the affection which either directly or indirectly caused death?
10. Was there any special cause, direct or indirect, for the death, in the use of alcoholic beverages, drugs, occupation or residence of deceased?
11. For how long a time was deceased confined to the house, or prevented from attending to business?
  - a. Was there a coroner's inquest or a post-mortem examination on the body of deceased?
  - b. If so, which, by whom and with what result?
12. Did any other physicians attend deceased during last illness? If so, give name and address of each.
  - a. Where did you receive your medical education?
  - b. What is the date of your graduation?

Dated at Reno, Nevada, this 15th day of March, 1915.

William C. Neasham.

18 years.

Reno, Nevada.

Sparks, “

Farmer and stockman.

48 years, — months, — days.

Height? — feet — inches. Color of hair? Dark.

Approximate weight in health? 190 lbs. Color  
of eyes? Brown.

a. Reno, Nevada.

b. February 27, 1915.

\_\_\_\_\_

a. \_\_\_\_\_

b. \_\_\_\_\_

a. Gunshot wound of head and brain.

b. Death was instantaneous.

a. None.

b. \_\_\_\_\_

\_\_\_\_\_

No.

\_\_\_\_\_

a. Yes, there was a coroner inquest.

b. Yes, I perform a post-mortem examination.

No.

a. Missouri Med. Col., St. Louis, Mo.

b. March 5, 1879.

Dated at Reno, Nevada, this 15th day of March,  
1915.

Signature:

S. C. GIBSON,

Postoffice Address, Reno, Nevada.

**Friend's Statement No. 3—Proof of Death.**

**PROOFS OF DEATH.**

**FRIEND'S STATEMENT No. 3.**

This Statement must be made by a person of legal age, intimately acquainted with, but not related to the deceased, who is not interested in the claim, and has seen the remains.

1. Name of deceased in full.
2. How long have you known deceased?
3. Where has deceased resided during your acquaintance?
4. What have been deceased's several occupations?
5. What was the age of deceased?
  - a. Place of death.
  - b. Date of death.
6. Have you seen the body?
7. Do you know the deceased to be the person whose life was insured in the Policy of Insurance upon which the claim is based?
8. Date of burial.
9. Place of burial.
10. What is your age?
11. What is your occupation?
12. How long have you resided at your present address?
13. Are you a relative of deceased?
14. Are you, in any way, directly or indirectly interested in the proceeds of any insurance on the life of deceased?
  - a. Are you a policy-holder in this Company?
  - b. If so state the number of your policy.

Dated at Reno, Nev., this 15 day of March, 1915.

William C. Neasham.

Since January, 1901.

In Washoe County, Nevada.

Farmer and stockman.

About 49 years.

a. Washoe County, Nevada.

b. February 27, 1915.

Yes.

Yes.

March 2, 1915.

Mountain View Cemetery, near Reno, Nev.

53 years.

Manager Insurance Dept. Washoe County Bank.

16 years in Reno, 26 years in Washoe County.

No.

No.

a. No.

b. ———.

Dated at Reno, Nev., this 15 day of March, 1915.

Signature: C. R. CARTER.

Postoffice Address, 101 Ralston St., Reno, Nev.



**Plaintiff's Exhibit "D."**

Indorsed:

No. 1007.

U.S. Dist. Court

Dist. N.Y.

Voucher

v.

New York Life Ins. Co.

Plaintiff's Ex. D.

Filed March 10, 1910

C. J. Hensch, Clerk.

Not a D. for Identification

1910

Plaintiff's Exhibit "E."



EXHIBIT

U. S. 1867,

U. S. LAND, COURT,  
1867, Novem,

March

U.

NEW YORK, 1867, 1867,

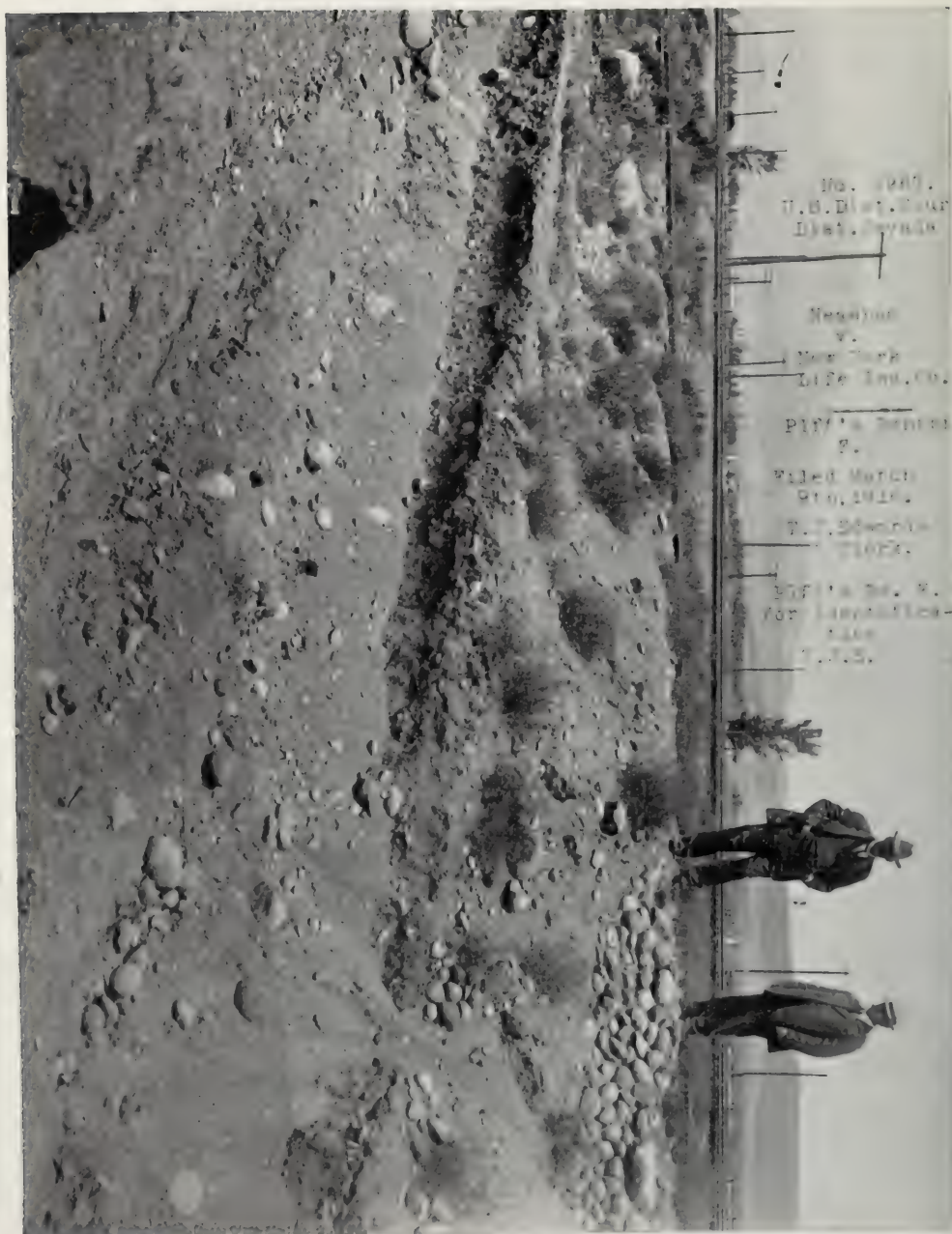
1867, 1867, 1867,

1867, 1867, 1867,

U. S. 1867, 1867,

PLAINT EX. U. S. 1867, 1867,  
1867, 1867,  
U. S. 1867,



**Plaintiff's Exhibit "F."**

**Defendant's Exhibit No. 2.**

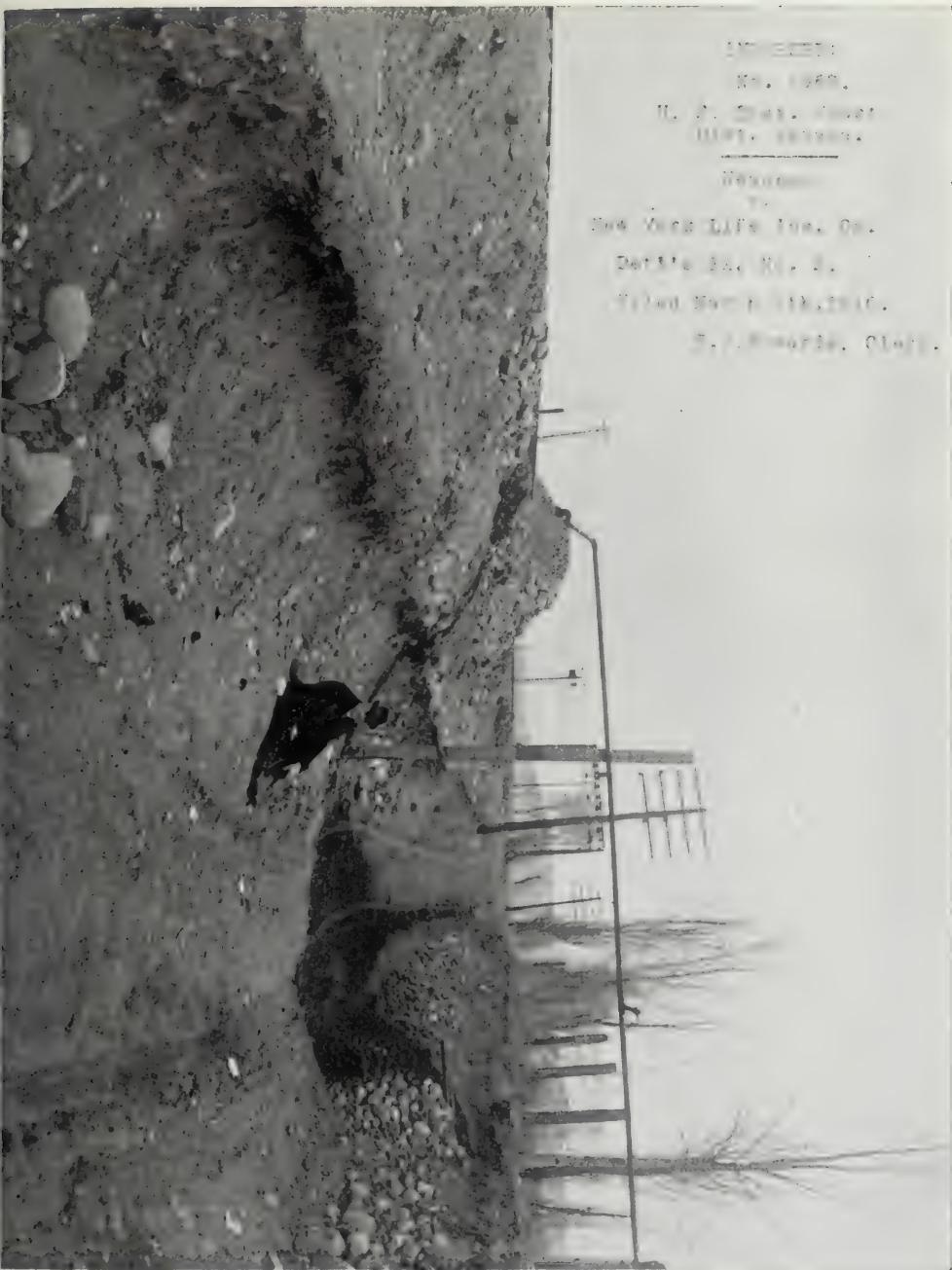


EXHIBIT:

No. 1989.

U. S. DIST. COURT  
DIST. DISTRICT

Western

To

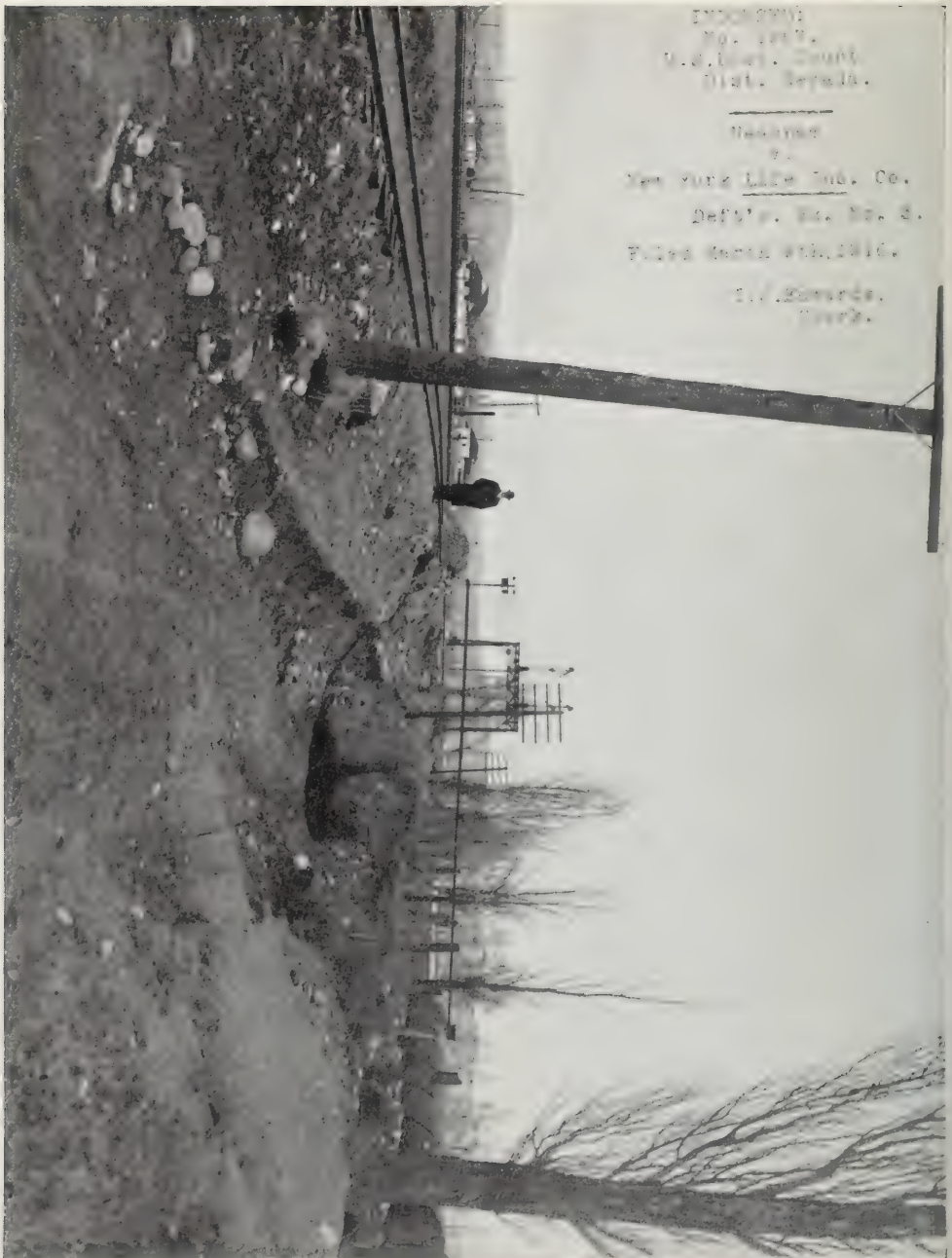
THE VICE LIFE INS. CO.

Defendant No. 1.

Filed March 18, 1910.

J. J. Edwards, Clerk.



**Defendant's Exhibit No. 3.**

**Certificate of U. S. District Judge to Bill of  
Exceptions, etc.**

The judgment in this case was entered on the verdict on March 10, 1916, and thereafter, on March 17, 1916, an order was granted by the Trial Judge in these words:

“Upon application of the above-named defendant, New York Life Insurance Company, a corporation, and good cause appearing therefor, and by consent of plaintiff’s attorney, [238] execution upon the judgment entered herein on the 10th day of March, 1916, is hereby stayed for a period of forty-two (42) days from the date of the entry of the judgment herein, upon defendant filing herein and within forty (40) days from the date of the entry of the judgment herein, a bond, subject to the approval of the court or the judge thereof, who tried the above-entitled action, properly conditioned with sufficient sureties or surety in the penal sum of \$10,000, in order to give the defendant, and defendant hereby is given, additional time, to wit, forty-two (42) days from the date of the entry of the judgment herein, to file in the Clerk’s office of the above-entitled Court its petition or motion for a new trial.

“It is further ordered that jurisdiction be and is hereby retained of and over the above-entitled case by said court over and beyond the February term, 1916, in order to enable and permit said defendant to file, and said defendant is hereby

given additional time, to wit, (20) days after decision or determination of defendant's said petition or motion for a new trial, within which to prepare, serve, present, have settled and authenticated and to file its bill of exceptions by it reserved; and that defendant's petition or motion for new trial, if filed, and that its bill of exceptions may be presented and allowed, authenticated, served, filed and determined after the expiration of the February Term, 1916, of said court, and for those purposes jurisdiction of this case is hereby retained."

The defendant, within forty-two (42) days granted by the order, filed its petition for a new trial, which was in due course submitted, and thereafter, on July 16, 1917, the Court filed its opinion thereon, and an order was entered in accordance therewith denying a new trial.

On January 16, 1917, defendant filed with the clerk the foregoing Bill of Exceptions, comprised within pages from 1 to 237, inclusive, but did not serve the same on plaintiff's counsel until the 21st day of July, 1917, after the entry of the order denying a new trial, at which time plaintiff's counsel refused to acknowledge or accept service thereof because served too late. Thereafter, on July 23, 1917, defendant presented its said bill to the undersigned, the Trial Judge, for certification as to its correctness. On July 24th the plaintiff's counsel, without proposing any amendments to the bill, interposed certain objections to its certification by the Judge, the main features of which are:

1. That "the exception to the charge, noted on pages 202-203 of the Transcript, is insufficient in that it does not state distinctly the portion or portions of the charge excepted to"; [239]

2. That "the Proposed Bill of Exceptions does not contain the opinion of the Court";

3. That "the Proposed Bill of Exceptions was not served or presented in time."

"The case was tried and judgment entered on the verdict on March 10, 1916. A new trial is not necessary for purposes of obtaining a review by the Court of Appeals (citing cases). 'No appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed.'

(4th Fed. Stats. Ann. 428.)

"In this instance the 'order, judgment or decree' sought to be reviewed was the judgment entered March 10, 1916. The motion for a new trial is not subject to review. It seems clear, therefore, that the presentation of the Proposed Bill of Exceptions at this late day is a mere idle and vain thing, since if a petition for writ of error were now presented, the writ ought not to issue."

Being of opinion that these objections, so far as material, present questions for the consideration of the Court of Appeals upon the writ of error, should one be sued out, and may not be competently disposed of here; and it appearing that the Proposed Bill of Exceptions comprises all the evidence and proceed-



ings had at the trial (excepting only Plaintiff's Exhibit "C," a coat, and Defendant's Exhibit 1, a pistol, magazine and cartridges), and has been served within the time prescribed by the orders of the Court, the same is hereby certified by me to be in all respects true and correct as to the facts therein recited; the purpose of this certificate being to present the record of the proceedings had in the court below to the Circuit Court of Appeals, preserving the rights of both parties upon the facts recited, to have determined by said last-mentioned court as to the validity of the orders extending time to settle this bill, and whether or not such Bill of Exceptions has been presented and certified in time to be of avail [240] in reviewing the Judgment.

Dated, August 7th, 1917.

WM. C. VAN FLEET,  
Judge.

[Indorsed.] [241]

---

[Title of Court and Cause.]

**Order Directing Transmission to Appellate Court of  
Certain Original Exhibits.**

It appearing to the Court that plaintiff's original Exhibit "C," being a coat, and defendant's original Exhibit 1, being pistol, magazine and cartridges, should be inspected by the Court of Appeals in connection with the record on Writ of Error.

It is hereby ordered that said exhibits be forwarded with the record, and that said exhibits be returned to the clerk of the above-entitled court in due course.

Dated, September 12th, 1917.

WM. C. VAN FLEET,  
District Judge.

[Indorsed.] [244]

---

[Title of Court and Cause.]

**Affidavit of Reta S. Arkell of Service of Bill of  
Exceptions.**

State of Nevada,  
County of Washoe,—ss.

Reta S. Arkell, being first duly sworn, upon oath deposes and says: That she is a citizen of the United States, a resident of the State of Nevada, over the age of twenty-one years, and was at all times herein mentioned; that on the 21st day of July, 1917, she personally served upon Thomas E. Kepner, attorney for plaintiff in the above-entitled action, at his law office in Reno, Nevada, a bill of exceptions in the above-entitled action, by presenting and showing to said Thomas E. Kepner the original bill of exceptions, and by delivering to and leaving with said Thomas E. Kepner, a full, true and complete copy of said bill of exceptions, in the above-entitled action, at the time and place hereinabove mentioned.

RETA S. ARKELL.

[Indorsed.] [245]

PO. San Francisco, Cal.  
338 PM. Sept. 12-17.

Thos. J. Edwards,  
Clerk U. S. District Court,  
Carson City, Nev.

Have today made order in Neasham versus New  
York Life extending time for filing record to Octo-  
ber first.

WM. C. VAN FLEET.

[Indorsed.]

[Title of Court and Cause.]

**Order Extending Time to File Record to October 1,  
1917.**

Good cause appearing therefor, it is ordered that  
the defendant have to and including October 1, 1917,  
within which to file in the Court of Appeals the rec-  
ord on writ of error, heretofore issued in the above-  
entitled case.

Dated, September 12th, 1917.

WM. C. VAN FLEET,  
District Judge.

[Indorsed.]    [246]

---

[Title of Court and Cause.]

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, T. J. Edwards, Clerk of the District Court of the  
United States for the District of Nevada, do hereby  
certify that the foregoing two hundred and forty-six  
(246) typewritten pages, numbered from 1 to 246,  
inclusive, to be a full, true and correct copy of the

record and of all the proceedings in said cause and court, and that the same, together with the original Citation and Writ of Error, hereto annexed, constitute the return of the Writ of Error.

I do hereby certify that the costs of the foregoing record is \$138.80, and that the same has been paid by the defendant herein.

I further certify that pursuant to order of Court, found on page 244 of this record, I have this day forwarded to the clerk of the U. S. Circuit Court of Appeals, plaintiff's original Exhibit "C," and defendant's original Exhibit 1, introduced and filed in said cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Carson City, Nevada, this 29th day of September, 1917.

[Seal]

T. J. EDWARDS,  
Clerk. [247]

---

[Title of Court and Cause.]

**Citation on Writ of Error.**

To Matilda C. Neasham, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, thirty days from and after the date this citation bears, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Nevada, wherein New York Life Insurance Company, a corporation



is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said New York Life Insurance Company, a corporation, plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS Honorable WM. C. VAN FLEET,  
Trial Judge of the District Court of the United  
States for the District of Nevada, this 13th day of  
August, A. D. 1917.

WM. C. VAN FLEET,  
United States District Judge.

[Indorsed.] [248]

---

[Title of Court and Cause.]

**Writ of Error.**

United States of America,  
Ninth Judicial Circuit,—ss.

The President of the United States of America to  
the Honorable Judge of the District Court of the  
United States for the District of Nevada, Greet-  
ings:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in the  
said District Court before you between New York  
Life Insurance Company, a corporation, plaintiff in  
error, and Matilda C. Neasham, defendant in error,  
a manifest error has happened to the damage of New  
York Life Insurance Company, a corporation, plain-  
tiff in error, as by said complaint appears, and we

*be* willing that error, if any should have been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, where said court [250] is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States, should be done.

WITNESS Honorable EDWARD D. WHITE,  
Chief Justice of the United States, this the 13th day  
of August, A. D. 1917.

[Seal] T. J. EDWARDS,  
Clerk of the United States District Court for the  
District of Nevada.

By H. D. Edwards,  
Deputy.

Allowed this the 13th day of August, A. D. 1917.

WM. C. VAN FLEET,  
United States District Judge.

[Indorsed.] [251]

[Endorsed]: No. 3057. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Plaintiff in Error, vs. Matilda C. Neasham, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed October 1, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

*United States Circuit Court of Appeals for the Ninth  
Circuit.*

No. 3057.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

**Stipulation and Statement In Re Printing Record, in  
Above-entitled Case, Under Rule 23.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the undersigned, attorneys for the  
respective parties hereto, as follows:

1. That for consideration of errors assigned and  
filed herein only parts of the record need be printed.

2. That this stipulation and statement may be printed as a part of the record herein.

3. That this cause was commenced by defendant in error, as plaintiff, against plaintiff in error, as defendant, April 30, 1915, by filing complaint in, and having summons issued out of, the Second Judicial District Court of the State of Nevada, in and for the county of Washoe; that such summons was served and thereafter and within the time authorized, upon application of the defendant, plaintiff in error, due and legal proceedings were had whereby such cause was duly and regularly removed into the District Court of the United States, for the District of Nevada; and such record so removed was filed in said Court within the statutory time, and on June 8th, 1915.

4. That on March 10, 1916, and immediately after the verdict and judgment was returned and entered, upon motion of defendant a minute order was entered, whereby it was ordered that execution herein be stayed 42 days upon the filing of a bond in the sum of \$10,000; and that defendant have 42 days within which to take such further steps herein as advised; that thereafter a written "Order Staying Execution and Extending Time for Filing Petition or Motion for New Trial and for Bill of Exceptions," was made March 17, 1916, served and filed March 18, 1916; that thereafter and within the time allowed a "Bond for Stay of Execution" was tendered, approved and filed.

5. That thereafter and on April 17, 1916, and within the time allowed defendant served and filed



its "Notice of Motion or Petition for New Trial" and its "Petition or Motion for New Trial," with certification endorsed thereon by the trial judge allowing same to be filed.

6. That by orders of Court duly and regularly made and entered, jurisdiction was retained over the case from term to term of said court to enable defendant to prepare, serve, have settled and allowed and to file its bill of exceptions, and to have its petition or motion for new trial heard and determined; that within the time allowed the defendant did prepare, serve and had allowed and settled and filed its Bill of Exceptions by it reserved; that defendant's petition of motion for new trial was denied July 16, 1917.

7. That thereafter and within the time allowed, defendant's petition for Writ of Error and Assignments of Errors were served and filed; Writ of Error granted, amount of Supersedeas Bond fixed, bond given, approved and filed; Writ of Error and Citation issued, served and filed.

8. That thereafter and within the time allowed a full, true and correct copy of the record and all of the proceedings in said cause and court, together with original Citation and Writ of Error, was filed in the above-entitled court and docketed October 1, 1917.

9. That under and by virtue of the foregoing stipulation, the clerk of this court is requested *not* to have printed the following mentioned papers, appearing in said original certified record, at pages designated, to wit:

Papers.

Pages of Original  
Certified Record.

Summons, sheriff's return and endorsement . . . .	5-6
Order of removal and endorsement . . . . .	6-7
Notice of hearing and endorsement . . . . .	36
Endorsement . . . . .	42
Order and endorsement . . . . .	43
Order and endorsement . . . . .	44
Writ of error bond, and endorsement . . . . .	59-60
Praeipie and endorsement . . . . .	242-3

10. That Exhibit "A" to the complaint is a complete copy of the insurance policy or contract sued upon; that Plaintiff's Exhibit "A" upon the trial is the same complete insurance policy or contract appearing as Exhibit "A" to the complaint; that much of said policy or contract, under the assignment of errors filed is immaterial.

The Clerk is, therefore requested to have printed only the following designated parts of said insurance policy or contract appearing as Exhibit "A" to complaint and as Plaintiff's Exhibit "A" upon the trial, to wit:

Print only first page of policy, being page 3 and page 216 of the original certified record, and that part of said policy appearing on page 3 thereof under "Section 5—Other Benefits and Provisions" reading as follows,—

"SELF-DESTRUCTION.—In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal

to the premiums thereon which have been paid to and received by the Company, and no more."

No other part of said policy than that above designated, appearing in the original certified record at pages 3 and 216, is to be printed.

11. That of Plaintiff's Exhibit "B," proofs of death, appearing in original certified record at p. 217, the clerk is requested not to have printed the oath to claimant's physician's or friend's statement, nor the certification of the county clerk to the notary taking such oaths; neither will the clerk have printed any matter appearing on the back of either of said proofs of death—printing only claimant's, physician's and friend's statement, omitting all other portions of said Exhibit "B."

12. That Defendant's Exhibit 4, appearing in the original certified record at pages 223 to 238, both inclusive, is certified by the county clerk as containing and comprising true, full, perfect and complete copies of "Inventory and Appraisement," "Petition for Sale of Real Estate" and "Order of Sale of Real Estate," In the Matter of the Estate of William C. Neasham, Deceased.

It appears therein—that defendant in error is the administratrix of the Estate of William C. Neasham, deceased, the insured in this case; that all the real property of said estate was appraised at the total sum of \$25,000 and that all the personal property that came into the hands of the administratrix was of the total value of \$7,630.67; that all of the property of the estate is community property; that claims

against said estate paid, and unpaid which have been allowed and approved, including the balance due on contract to purchase some of the real estate amount to the sum of \$24,721.60; cash in bank at time of death of William C. Neasham, deceased, \$844.06; that on October 27, 1915, said administratrix filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe a petition seeking an order authorizing the sale of the real estate of said estate for the purpose of paying debts of said estate; in said petition, *inter alia*, petitioner alleged that in addition to the indebtedness set forth in Schedule B there will be the unpaid charges and expenses of administration which have accrued and which may yet accrue before the administration is finally completed and closed, which will, as petitioner believes and therefore alleges, amount to the approximate sum of \$1,000; and that there will yet accrue for the maintenance of the family of the deceased the sum of \$100 per month, payable until the further order of the court. Your petitioner therefore, alleges: That the personal property in the hands of your petitioner was insufficient to pay said family allowance, the debts outstanding against the said deceased and the unpaid expenses and charges of administration which have accrued, and which may yet accrue, and for the purpose of paying the same, it is necessary to sell the whole or the greater portion of the real estate described in Schedule C hereto annexed.

That thereafter and on November 18, 1915, said Court made and entered an order of sale authorizing



the sale of all said real estate to pay the claims secured by mortgage upon the farm lands therein described and to pay other claims and indebtedness against said estate, including charges and expenses of administration.

That in view of the foregoing statement as to the substance of defendant's said Exhibit 4, it is not necessary to print any part thereof, and the clerk is requested not to print any part of said Defendant's Exhibit 4, appearing at pages 223 to 238, both inclusive.

13. That the printing of the venue and title of the case as same appears at the beginning of each paper filed and as same appears endorsed upon each paper filed will not aid the Court in determining errors assigned; we therefore request that such venue and title of the case so appearing upon the papers filed be not printed—with the sole exception of the venue and title and endorsement appearing on the complaint herein; and since it is agreed by the parties hereto that all steps were taken and all pleadings served and filed and all proceedings were taken, served and filed or had within the proper time allowed for same, it will not aid the Court in determining the errors assigned to have printed the various endorsements showing service and filing of the various papers making up the record; we therefore request that none of the endorsements upon any of the papers except the complaint be printed; that all papers and documents not hereinabove requested to be omitted from the printed record are to be printed.

Dated: Reno, Nevada, October 16, 1917.

CHENEY, DOWNER, PRICE & HAWKINS,  
Attorneys for Plaintiff in Error.

THOMAS E. KEPNER,  
Attorney for Defendant in Error.

[Endorsed]: No. 3057. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Plaintiff in Error, vs. Matilda C. Neasham, Defendant in Error. Stipulation and Statement in Re Printing Record, etc. Filed Oct. 17, 1917. F. D. Monckton, Clerk.

---

WESTERN UNION TELEGRAM.

Received at Post Office Building, 7th and Mission Sts.  
78sf ms 27 blue 4 ex

Carson City, Nev., 249pm, Sept. 11, 1917.

Hon. Wm. W. Morrow, U. S. Circuit Judge, San Francisco, Calif.

Please wire order extending time to October first to file record on writ of error case of Neasham against New York Life Ins. Co.

T. J. EDWARDS,  
Clerk U. S. Dist. Court.  
427pm.

*United States Circuit Court of Appeals for the Ninth Circuit.*

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

**Order Extending Time to File Record and Docket  
Cause to October 1, 1917.**

Upon telegraphic application of the clerk of the United States District Court for the District of Nevada, this day filed, and good cause therefor appearing, ORDERED time to file Transcript of Record and to docket the above-entitled cause in this court be, and hereby is extended to October 1, 1917.

WM. H. HUNT,  
United States Circuit Judge.

Dated San Francisco, California, September 12, 1917.

[Endorsed]: No. 3057. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company vs. Neasham. Order Under Rule 16 Enlarging Time to Oct. 1, 1917, to File Record Thereof and to Docket Case. Filed Sep. 12, 1917. F. D. Monckton, Clerk. Refiled Oct. 1, 1917. F. D. Monckton, Clerk.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

2

---

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

---

BRIEF FOR PLAINTIFF IN ERROR.

---

FILED  
JAN 22 1918  
U. S. DISTRICT COURT  
CLARK

CHENEY, DOWNER, PRICE & HAWKINS,  
Attorneys for Plaintiff in Error.

JAMES H. McINTOSH,  
Of Counsel.

---





No. 3057.

**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

---

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

**Brief for Plaintiff in Error.**

This case was commenced by defendant in error, hereinafter referred to as plaintiff, against plaintiff in error, hereinafter referred to as defendant, to recover upon a life insurance policy the sum of \$10,000 and interest; verdict and judgment for plaintiff; motion for new trial denied; hence writ of error from final judgment.

**STATEMENT OF THE CASE.**

Plaintiff's complaint alleges: That on July 10, 1914, defendant, in consideration of the payment of the annual premium of \$456.90, executed and delivered its policy of life insurance on the life of plaintiff's husband, William C. Neasham, in the sum of \$10,000, which policy marked Exhibit "A" was attached to and made a part of the complaint; that on

February 27, 1915, the insured died; that plaintiff furnished defendant with due proof of the death; that at the time the policy was issued and at the time of death, plaintiff was the wife of the insured; that plaintiff has performed all the conditions of the said policy on her part to be performed; that defendant has not paid said sum of \$10,000, or any part thereof. Wherefore plaintiff demands judgment for \$10,000 and interest.

The said contract, Exhibit "A" to the complaint, contains, *inter alia*, the following:

"SELF-DESTRUCTION:—In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more."  
(Tr. 1-5.)

To the complaint defendant demurred and moved to have the complaint made more specific and certain for grounds stated in the demurrer and notice of motion (Tr. 3-8); the demurrer and motion were denied (Tr. 9).

Defendant's amended answer puts in issue all material allegations in plaintiff's complaint. It specifically denies that by the terms of said policy it "promised or agreed to pay the plaintiff \$10,000 upon due proof of the death of said William C. Neasham. And in that behalf, the defendant alleges that in and by the terms of said policy, in the event of self-destruction during the first insurance year, whether the insured was sane or insane, the

insurance under said policy shall be a sum equal to the premiums thereon which have been paid to and received by the defendant, and no more." That the insurance year commenced July 10, 1914, and that during the first insurance year, on February 27, 1915, said Neasham, the insured, "*destroyed himself, and then and there died as the result of a self-inflicted gunshot wound*"; that defendant, upon receipt of due proof of death, became by the terms of said contract obligated to pay a sum equal to the premiums thereon which had been paid to and received by the defendant, and no more; that no premium had been paid; defendant admitted that it did not pay the \$10,000 or any part thereof, and denied that said sum or any sum or amount was due plaintiff, and denied that it was indebted to plaintiff in any sum or amount whatsoever.

For an affirmative, separate defense, defendant in its amended answer set forth,—the execution of the policy, containing the "self-destruction" clause; that the insurance year commenced July 10, 1914, and that the insured February 27, 1915, was discovered dead, with a *gunshot wound in the roof of his mouth*; that said Neasham on February 27, 1915, "*destroyed himself, and then and there died as the result of a self-inflicted gunshot wound,*" and alleging no liability except a sum equal to the premium paid, and that no premium had been paid; hence no liability. (Tr. 9-13.)

Plaintiff's reply, *inter alia*, puts in issue the allegations of new matter in defendant's answer. At paragraphs II and V plaintiff says:



“Plaintiff denies \* \* \* that said William C. Neasham, either *destroyed himself*, or either then or there died as the result of a *self-inflicted* gunshot wound, and in this behalf *plaintiff alleges* that her husband, \* \* \* *came to his death* on February 27th, 1915, *at the hands of some person or persons unknown to plaintiff.*” (Paragraph II.)

“And for a further reply \* \* \* plaintiff alleges that her husband, \* \* \* came to his death on the 27th day of February, 1915, *from a gunshot wound* inflicted upon him at the hands of some person or persons unknown to plaintiff.” Paragraph V. (Tr. 14-16.)

Under the pleadings and the issues thus joined, the case went to trial.

During the opening statement by plaintiff's attorney, the following appears:

“The COURT.—I think it would be in order, Mr. Kepner, for you to outline briefly to the jury what you expect to prove to maintain your case; you forgot it, perhaps, by stating the pleadings.

Mr. KEPNER.—If your Honor please, the position I take is, in order to maintain and establish the case, is proof of the facts which I have outlined.

The COURT.—Well, perhaps you are right about that. You see, it is not admitted that the deceased died, so your evidence will have to show his death, *and that will involve showing the means by which he died.*

Mr. KEPNER.—Showing that he died?

The COURT.—Yes.

Mr. KEPNER.—I think, if your Honor please, we are anticipating just a little perhaps. Under the terms of the policy, death is the only thing we have to prove; and we will prove death. I might state, in order that the jury may understand the form that this controversy will take, that the defendant, as I understand it, will contend that the insured died by his own hand, or by his own act; the plaintiff on her part, will contend as to that point that the insured came to his death at the hands of some person or persons unknown—some person or persons *other than the insured*. I think, if your Honor please, that is all I care to state at this time.” (Tr. 75.)

Plaintiff to establish the issues thus made testified in her own behalf (Tr. 76 et seq.) to the effect—that she is the widow of Neasham, deceased, the insured; that the insured died February 27, 1915; the policy, Exhibit “A” to the complaint, is identified and offered in evidence as Plaintiff’s Exhibit “A” (Tr. 77, 306); that subsequent to the death of the insured proofs of death were furnished, said proofs of death being identified and offered and admitted in evidence as Plaintiff’s Exhibit “B” (Tr. 82, 308–313); that no objections to the sufficiency of the proofs of death were made by defendant so far as plaintiff knew; that the policy has not been paid. There was no cross-examination of plaintiff and plaintiff rested. (Tr. 84.)

At the conclusion of plaintiff’s testimony, defendant interposed a motion for a nonsuit and to direct a

verdict; said motion appearing at Tr. 84-87, and is as follows:

“Comes now the defendant, New York Life Insurance Company, by its attorneys, at the conclusion of all the evidence offered by the plaintiff herein, and moves the Court for a non-suit, and to direct a verdict for the defendant upon the cause of action asserted in plaintiff’s complaint, in so far as plaintiff seeks to recover the sum of ten thousand dollars as the amount of the insurance under said contract, Exhibit ‘A’ to the complaint herein. Said motion is made upon the grounds and for the reasons as follows, to wit:

1. That the cause of action asserted in plaintiff’s complaint is founded and based upon a written contract, Exhibit ‘A’ attached to and made a part of the complaint.

2. That it appears from the face of the complaint:

- (a) That in event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more.

- (b) That the first insurance year under said contract, Exhibit ‘A’ to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

- (c) That the insured, William C. Neasham,

during said first insurance year, and on to wit, the 27th day of February, 1915, died.

(d) That by the terms of said contract, Exhibit 'A' to the complaint, the amount of the insurance thereunder is fixed and determined by the facts applicable thereto, as therein stated; and the amount plaintiff would be entitled to receive as the amount of insurance under said contract upon the death of the insured, William C. Neasham, depends upon the fact, did or did not the insured, William C. Neasham, destroy or kill himself.

(e) That said insured, William C. Neasham, may have killed or destroyed himself, in which event the insurance under said contract, Exhibit 'A' to the complaint, was not ten thousand dollars, but was the sum of \$456.90, and no more.

3. That plaintiff's pleadings and proof establish, among other things, the following facts, to wit, that the insured, William C. Neasham, came to his death from a gunshot wound; that said gunshot wound was of the head and brain, and that death was instantaneous.

4. That to entitle plaintiff to recover said sum of ten thousand dollars as the amount of the insurance under said contract, Exhibit 'A' to the complaint, it must be made to appear as a fact that the insured, William C. Neasham, is dead, and that his death was from some cause by reason of which, under the express terms of the contract, plaintiff is entitled to receive the said ten thousand dollars. That while it is ad-



mitted in the pleadings and established by plaintiff's proof, that the insured, William C. Neasham, came to his death from a gunshot wound, there is no proof of any fact from which it can be determined that said insured, William C. Neasham, did not destroy or kill himself.

5. That plaintiff has failed to establish the material fact alleged in paragraph four of the complaint, and denied in paragraph three of the amended answer, that plaintiff furnished defendant with due proof of the death of the insured, William C. Neasham; that the proofs of death offered in evidence by plaintiff do not constitute due proof of death as is required by the contract, Exhibit 'A' to the complaint, in that it appears from said proofs of death that the insured came to his death from a gunshot wound of head and brain, and that death was instantaneous, but it does not appear therefrom whether the insured did or did not destroy himself; and inasmuch as defendant's obligation under the contract, Exhibit 'A' to the complaint, in case of self-destruction during the first insurance year was for a sum equal to the premiums thereon paid to and received by the company, and no more, and that the premium was not ten thousand dollars, and does not exceed \$456.90, the extent of defendant's obligation could not be determined from the proofs of death in evidence as proofs of death furnished by plaintiff to the defendant company.

6. That plaintiff has failed upon the trial to prove a sufficient case for the Court and jury, in so far as plaintiff seeks to recover a judgment in the sum of ten thousand dollars as the amount of the insurance, and said amount being one of the sums specified in said contract, Exhibit 'A' to the complaint, to be paid to plaintiff as the amount of the insurance upon the establishment of certain facts; but the facts essential to plaintiff's right to recover said sum of ten thousand dollars under said contract, Exhibit 'A' to the complaint, as the amount of the insurance, have not been established by plaintiff's evidence."

After argument, the motion was denied, exceptions reserved for the reasons stated in the motion and the grounds therefor.

The Court having denied its said motion, the defendant, to meet the burden cast upon it by the ruling of the Court, offered testimony to establish the allegations of defendant's amended answer.

That the insured *came to his death from a gunshot wound* February 27, 1915, and *within the first insurance year* is an uncontroverted, established fact. It is alleged in and admitted by the pleadings; it is established by plaintiff's proof and by defendant's proof interposed for the purpose of establishing that the insured destroyed himself.

The issue of fact remaining undetermined, under the ruling of the Court denying the motion above mentioned, was whether or not the insured *shot himself*, as maintained by defendant, or whether the insured came to his death from a gunshot wound in-

flicted upon him by some person or persons unknown,—some person or persons *other than the insured*, as maintained by plaintiff.

The proof established without contradiction certain facts which in chronological order are as follows:

Plaintiff, as a witness for defendant (Tr. 148), testified that she saw deceased Friday evening about six o'clock; the next time she saw him was Saturday morning before his death, but she did not know whether or not deceased stayed at home Friday night.

About six o'clock Friday evening deceased purchased a 32-Savage automatic pistol, and asked and was shown how to load and work it, and when told by the party selling the pistol to him that he did not have enough shells to fill it, insured said "there would be plenty" (Tr. 111, 112).

The coroner, undertaker and sheriff upon arriving at the place where Neasham's body lay dead or dying in the gravel-pit the following morning between ten and eleven o'clock, found on the ground and within from three to eight inches from the right hand of deceased a 32-Savage automatic pistol, with *eight loaded shells in it and one empty 32 caliber shell* close by his side; this pistol and shells were preserved and admitted in evidence as Defendant's Exhibit 1, and the pistol was identified as being the pistol sold to the insured about six o'clock the evening prior to the morning of insured's death (Tr. 101, 127-128, 151-155, 157).

Hammersmith testified that he saw insured walking down the railroad track alone towards Sparks

from Reno between 8:15 and 8:45 on the morning of his death (Tr. 89).

All the testimony is, and it was testified to by several witnesses, that the character of the ground in the gravel-pit or cut was sandy, damp and showed all tracks distinctly and clearly; that there was only one line of tracks or footprints leading to the body where it lay on the sloping bank of the gravel-pit or cut; that there were no other footprints or tracks nearer to the body than eight to ten feet, than the one line of tracks leading to the place where the body lay; that deceased's hat lay on the ground perhaps ten inches from the head, to the right side; that the clothing of the deceased was in perfect order and not dishevelled in any way or manner; that there was no cut, bruise or abrasion of the skin, contusion of any kind upon the body, except wound in the back of the mouth and in the back part of the head; that the teeth were intact, the tongue was not injured, nor the lips bruised or marred or injured in any way whatsoever; that there was no blood upon the deceased except in the mouth and nose and upon the right-hand coat sleeve; that the only wound was far back in deceased's mouth, and so located as not to be visible except by pressing down the tongue, and a stellar-shaped fracture, a piece of bone pushed *out* beyond the surface of the contour of the bone of the occipetal protuberance; that the stellar-shaped fracture was back and a little upwards from the entrance or beginning of the wound in deceased's mouth.

Sheriff Ferrell, testifying concerning injuries, said: "A. I found an injury through the



mouth in the back part—in the head. Q. Did you see any other injuries on him? A. I didn't find any other. Q. Can you state the nature of that injury that you refer to through the mouth? A. You mean what had caused it? Q. Yes. \* \* \* Witness. The injury, I would describe it as a blow-out from concussion. Q. You are speaking now of the external injury? A. *There was none outside; it was through the mouth*, but toward the back of the head, like concussion, tearing quite a large hole, and carrying everything in front of it, caused by the explosion of the shell fired from the gun." (Tr. 159-161.)

Dr. Gibson, county physician, who performed the post-mortem autopsy, testified that he found a wound on the right side of the throat, penetrating, and also a fracture of the back part of the skull; that he introduced his finger into the throat and found a wound, could touch fractured bone in the wound; that he found the posterior part of the skull prominent, removed the scalp and found a stellated fracture, and a piece of the bone pushed out beyond the surface of the contour; that he did not go into the cavity "because his brother-in-law was there, and he requested me not to cut the body any more than I had to"; that he found out what was the cause of the death, and that the wound described would produce immediate death; that neither the tongue, lips nor teeth showed any injury. (Tr. 193-198).

Dr. Morrison, after being referred to the testimony of Dr. Gibson describing the character and

location of the wound and the fact that neither the teeth, tongue nor lips were injured, gave it as his opinion that the wound could not have been inflicted except the instrument causing the wound *was in the mouth* of the deceased. The Doctor was then asked, "Explain why it could not," to which he answered:

"A. A wound of that description would have to be caused by—if it was done by a gun, by the gun being in the mouth, or the tongue would be pierced by anything coming in through the mouth, and possibly the lips; or the teeth knocked out; it would not be possible to have a wound of that kind otherwise, except in the act, as Doctor Gibson says, of yawning or gagging, and very improbable then; because even if the tongue was out of the way, to get a wound coming from the outside,—well the mouth doesn't open so far as that [referring to skull used for illustration] and the soft part is below that; you would not get the range, unless you hit the hard palate, and the hard palate was not hit." (Tr. 210–211.)

Mr. Burke, witness for plaintiff in rebuttal, ex-Chief of Police of Reno, ex-Sheriff of Washoe County, ex-Superintendent of State Police, at Tr. 233, testified that he examined the body at the undertaker's and that the only wound he saw was the one in the mouth.

"Q. Did you notice any other injuries of any character? A. I did not."

Examining the record more in detail and giving the evidence in a narrative form in reference to subjects, it appears from the record,—

*A Gunshot Killed Neasham.*—This is asserted and proved by plaintiff and stands uncontroverted. Defendant alleged in its amended answer that Neasham died as the result of a self-inflicted gunshot wound (Tr. 12). Plaintiff in her reply alleged that Neasham died from a gunshot wound inflicted upon him at the hands of some person or persons unknown to her (Tr. 16). The proofs of death introduced in evidence by plaintiff state that Neasham died from a gunshot wound of head and brain (Tr. 82, 311). There is no evidence that his death was from any other cause, and the plaintiff's only claim, as disclosed by the record, is that this gunshot wound was not inflicted by Neasham, but was inflicted by some person or persons other than the insured (Tr. 14, 16, 75).

Neasham, Farmer, Ranchman and Stockman, 48 Years Old (Tr. 309, 311, 313), Physically Powerful (Tr. 179, 180, 203), Received the Gunshot Wound of Head and Brain in Broad Daylight About 10 o'clock A. M.

8:20 o'clock Saturday morning, February 27, 1915, insured's wife last saw him alive (Tr. 148). 8 to 9 o'clock that morning, Verdi Peterson, a laborer, knowing insured for more than twenty years, met and talked with him on the streets of Reno (Tr. 276, 277). 8:15 to 8:45 o'clock the same morning, insured, walking along the Southern Pacific Railway tracks easterly from Reno towards Sparks, while

about two city blocks east of the company's Reno depot was seen by George N. Hammersmith, a switchman, who had known him eight or ten years (Tr. 88-92).  $21\frac{1}{2}$  to  $23\frac{1}{4}$  miles east of this place where he was between 8:15 and 8:45 (Tr. 93), insured was discovered about ten o'clock that morning dead or dying about sixteen feet south of the Southern Pacific tracks in an open cut, parallel thereto (Tr. 317, 318). 10 to 11 o'clock the same morning, C. P. Ferrell, Sheriff of the county, having been notified of the body's discovery, accompanied by F. K. Unsworth, the coroner, and F. O. Chick, the undertaker, arrived in an automobile at the scene (Tr. 164, 165, 180). About ten o'clock that morning Peterson heard of Neasham's death.

No Evidence of Robbery—Evidence Conclusively to the Contrary.

The unimpeached and uncontradicted testimony of Coroner Unsworth is that he, examining the body before it was disturbed, found on it \$2.50, purse, gold watch, chain and charm, stick-pin, fountain-pen and other articles (99, 100).

32-Caliber Savage Automatic Pistol, Purchased by Neasham About 16 Hours Before His Death and Then Loaded With Nine Cartridges, Found Near Body Loaded With Only 8 Cartridges and Near an Exploded 32-Caliber Cartridge.

When the body was discovered, the uncontradicted testimony of the five witnesses who testified on the subject is that there lay from three to eight inches of his right hand a 32-caliber Savage automatic pistol (96-100, 116, 122, 152, 155, 156, 172). That



the pistol then contained only 8 loaded shells is also conclusively proved.

Sheriff Ferrell, first to approach the body (95) picked up the pistol (104, 106, 151) and handed it to Coroner Unsworth (151), who examined it (106, 108) and a moment later handed it back to the sheriff (105, 106, 151), telling him to keep it until the coroner should call for it (105). The pistol when picked up, the hammer was back and a loaded cartridge in the chamber, the magazine contained shells (156, 157). It was thereafter locked in the sheriff's safe (157), remained in the sheriff's possession until, at the coroner's inquest two days later, Monday, March 1st (105), he delivered it to the coroner (157). In the meantime he had done nothing to the contents of the pistol except to remove the magazine which contained shells (156, 157) and a shell from the chamber (157). All of these, contained in the pistol when handed back to him by the coroner when they first viewed the body, he delivered at the inquest to the coroner (157). The coroner retained possession of the pistol and the shells from the time he received them at the inquest until he delivered them to Harry Hill, the county treasurer, a day or two after the inquest (101, 106, 127). When the county treasurer received them he and the coroner made a memorandum of the number on the pistol (106) which was "54589 (R)" (106, 107). The sheriff about a half hour after he picked up the pistol made a memorandum of the number on it (155). The coroner, when the pistol was handed to him by the sheriff when they first viewed the body, read the number on the pistol

(107, 108). At the trial the county treasurer produced the pistol and shells, in the same condition they were in when he received them from the coroner, and they were introduced in evidence (128). The number on the pistol was 54589 (R). The sheriff identified the pistol as the one he had picked up by the body (155), and the one he had delivered to the coroner at the inquest (157); the coroner likewise identified it (100, 107, 108). The pistol and contents picked up by the sheriff and coroner were the pistol and contents passed to the county treasurer, and by the county treasurer to the Court.

The shells produced at the trial by the county treasurer and received in evidence (128) were nine—*eight loaded and one empty* (127).

#### The Empty Shell.

When they first viewed the body, the coroner picked up an empty shell, 32-caliber, beside the body (101), kept it a moment or two and then handed it to the sheriff (105) directing him to keep possession of it until the coroner should call for it (105, 106); that the coroner then turned over to the county treasurer with the pistol an empty shell which looked like the one he had picked up and given to the sheriff, which he believed the sheriff delivered to him at the inquest and which the county treasurer produced at the trial (127). A 32-Savage automatic pistol when discharged automatically throws out the exploded shell replacing it in the chamber with a loaded shell (129, 248).

The Pistol Was Purchased by Neasham About Sixteen Hours Before It was Found Lying Near

His Body and When Purchased It Contained  
Nine Loaded Shells.

About 6 o'clock Friday evening, the day before his death, Neasham went to the store of Frank Collins to buy a pistol (111, 112, 130), and Collins, who waited on him, knew and recognized Neasham (111) and, seeing his body at the morgue the next day, recognized it as that of Neasham on whom he had waited at his store the day before (113). Collins showed Neasham a 32-caliber Savage automatic pistol (112), marked with a steel punch on the top of the magazine (141) and otherwise distinguishable on account of the tightness with which cartridges fitted into its magazine (143). The pistol when fully loaded held ten cartridges—nine in the magazine and one in the cylinder or chamber (112).

Neasham did not understand the pistol's mechanism (128, 129), so Collins loaded it for him and explained to him how it worked (128, 130). Had Collins put ten cartridges in the pistol, he would have inserted one in the chamber and nine in the magazine, as the magazine could hold only nine (112). But Collins testified that he delivered the pistol to Neasham loaded and that Neasham under his instructions worked the pistol so as to throw a cartridge into the cylinder (130). Had there been more than nine cartridges in the pistol, the cylinder would have been occupied and Neasham could not have thrown a cartridge into the cylinder. Collins testified that there were nine shells in the pistol when Neasham bought it (112, 130)—eight in the magazine and one in the barrel—that he called Neasham's attention to the

fact that there was one cartridge short (113). Collins at the trial identified the pistol there introduced in evidence as the pistol he sold Neasham (128).

**The Missing Cartridge and the Empty Shell.**

Missing from the pistol found near the body was one 32-caliber cartridge which was in the pistol about sixteen hours before.

Lying by the body was an empty 32-caliber shell near the 32-caliber pistol (101, 105, 106, 127). Had the pistol been discharged, it would automatically have thrown from its chamber an empty 32-caliber shell (129, 248).

**Nine Cartridges in the Pistol Were Plenty to Serve Neasham's Purpose in Purchasing the Pistol.**

When Collins, selling the pistol to Neasham, told him it contained only nine cartridges and he did not have enough shells to fill it, Neasham replied there were plenty (112, 113). There is no evidence tending to show that there was anyone from whom Neasham feared injury or toward whom he held animosity. Had there been such a person his widow would probably have known it and it would have been to her interest to disclose it at the trial. Yet, although she was three times on the witness-stand (76, 147, 281), nothing on the subject was elicited from her. Whatever Neasham's purpose was in buying the pistol sixteen hours before his death, it was a purpose to fulfill which he was satisfied nine cartridges in the pistol—one in the barrel and eight in the magazine—"were plenty." Had he apprehended an attack upon him, would he have regarded them as



plenty? What was this purpose in his mind which he was satisfied nine cartridges in the pistol were ample to execute?

Defendant's Exhibit 4, referred to in "Stipulation and Statement In Re Printing Record," at p. 332, "is certified by the county clerk as containing and comprising true, full, perfect and complete copies of 'Inventory and Appraisement,' 'Petition for Sale of Real Estate' and 'Order of Sale of Real Estate,' In the Matter of the Estate of William C. Neasham, Deceased," from which said documents it appears that deceased's estate was insolvent, that the real property was appraised at a total value of \$25,000, all personal property that came into the hands of the administratrix at a total value of \$7,630.67; that all the property of the estate is community property; thus leaving as estate property total appraised value amounting to \$16,315.38½; that claims paid and unpaid which had been allowed and approved, including balance due on purchase price of some of the real estate amounted to the sum of \$24,721.60; that there was in addition to this the approximate debt of \$1,000, and in addition to that the sum of \$100 per month for the family maintenance; that it became necessary to secure an order of Court to sell the real estate to pay the debts of deceased.

Neashum Absent from Home the Night Immediately Preceding the Morning of His Death.

In his cross-examination, Neasham's son admitted that he testified at the coroner's inquest two days after his father's death that his father was absent from home the night immediately preceding his

death (125). Mrs. Neasham testified that she did not know whether her husband was home or not, that Neasham might have slept upstairs (148). The son testified that he slept that night upstairs (126) and he, in a position to know the fact, admitted he had testified positively at the coroner's inquest that his father was not home that night (125).

#### Pistol Inserted in Neasham's Mouth When Fired.

a. The record discloses no dispute as to the location of the wound. The only witnesses who examined the wound were the undertaker, the county physician, the coroner and the sheriff. They examined the body at the undertaker's parlors where it had been removed on the day it was discovered (173). The wound could not be seen (173, 202), because the tongue obstructed the view and could not be sufficiently depressed to make the wound visible (202). But the wound was found (175, 193) by running the finger into Neasham's mouth way back to the right side of the entrance to the throat just a little above the protuberance which hangs down in the throat, and inserting it into the entrance of the wound at that point (175, 193, 196). The shot entered the soft palate and did not cut the hard palate above (196). The shot took a slightly upward course toward the back of the head, for Dr. Gibson, county physician for seven or eight years (192), who had practiced medicine for about thirty-five years (191) and had known Neasham for thirteen or sixteen years (192), and who performed the autopsy on his body (192), testified that to the right of the lower portion of the back of the skull slightly

above the entrance of the wound in the mouth at the right of the throat, he found a star-like fracture of the skull forced and driven out from the inside (193-196, 206).

A shot fired from a gun held outside Neasham's mouth could not have made the wound at the point this shot did. The soft palate at the place pierced by the bullet was below any point at which a gun held outside the mouth could have been aimed even if the mouth had been open as far as it could go. Dr. Morrison, physician and surgeon for fourteen years, county physician for ten or twelve years, experienced in making autopsies and caring for gunshot wounds (206, 207), testified:

“ \* \* \* to get a wound coming from the outside—well, the mouth doesn't open so far as that [referring to skull used for illustration] and the soft part is below that; you would not get the range, unless you hit the hard palate, and the hard palate was not hit” (211).

b. Neither the lips nor the teeth (173, 197) nor the tongue (197) showed any evidence of injury. The hard palate was not cut (196). This, the testimony of the undertaker and Dr. Gibson, is undisputed.

Dr. Gibson testified *it is inconceivable* that the wound could have been produced by a shot fired from a gun held *outside* Neasham's mouth without injuring the lips, teeth or tongue unless the mouth were open, as in the act of yawning, retching or crying out in agony in a hoarse and low-pitched voice *and also unless the tongue were depressed*. But that the

tongue could thus have been depressed is highly improbable, if not impossible, for, added the doctor:

“In examining the body I tried to look to see the wound through the mouth by depressing the tongue, and I could not do so. *I could not depress the tongue. The tongue obstructed the wound and I could not press it down far enough to see the wound, I tried it*” (202).

And Dr. Morrison testified (211):

“A wound of that description would have to be caused by, if it was done by a gun, *by the gun being in the mouth*, or the tongue would be pierced by anything coming in through the mouth, and possibly the lips; or the teeth knocked out.”

And then he qualified this statement by adding:

“Except in the act, as Doctor Gibson says, of yawning or gagging, *and very improbable then.*”

And then he in effect struck out this qualification, by continuing:

“Because even if the tongue was out of the way, to get a wound coming from the outside—well, the mouth doesn’t open so far as that and the soft part is below that; you would not get the range unless you hit the hard palate, and the hard palate was not hit.”

So both doctors in substance agreed that the place in the soft palate way back in the mouth at the right side of the entrance to the throat where the shot penetrated was so obstructed by the tongue that it



could not have escaped injury had the shot been fired from a gun held outside Neasham's mouth.

c. It is established that the entrance of the wound was quite a large hole (161), so that the middle finger of the undertaker—three-quarters to five-eighths inches in diameter—could be and was inserted into it (175, 176, 184); that it was not a clean-cut entrance, but was ragged, containing fractured bone (197) and torn by concussion from the explosion of a cartridge carrying everything in front of it to the back of the skull, which was puffed out (161) in the form of a star-like fracture (206).

Such a wound could not possibly have been produced by a shot fired from a gun held outside Neasham's mouth. It bore all the characteristics of a wound from a shot fired from a gun held against the objective when, according to the testimony, "the bullet enters, the gas is discharged, and the powder and so forth blows in the soft tissues, leaving a jagged, large crater-like opening" (208). It bore none of the qualities of a wound from a shot fired from a gun at a distance from the objective when "the entrance of the wound almost universally is the size of the bullet" (209), and therefore is clean-cut.

d. Lalonde, who discovered the body, must have been near when the shot was fired, but he heard no report (116). With the muzzle of the pistol back in the mouth, the report would be muffled. Neasham's death was practically instantaneous (310, 311, 198). When Lalonde discovered the body Neasham was still breathing (114, 116, 121, 122) and shortly thereafter when the sheriff, coroner and un-

dertaker arrived the heart was pulsating slightly (176). Lalonde discovered the body about ten o'clock (115); the news of Neasham's death reached Reno about ten o'clock (278). Lalonde must have been near when the gun was fired; yet he heard no report. Why? Because the gun was thrust way back in Neasham's mouth and the report was muffled.

The Shot not Accidentally Fired by Neasham—  
*There was no issue of accidental shooting.*

If Neasham fired the shot, he did so intentionally. Intentional shooting is alleged in the pleadings. Defendant in its answer alleges that Neasham "destroyed himself, and then and there died as a result of a self-inflicted gunshot wound" (10, 12). Plaintiff met the allegation by denying it and by averring in her reply that "Neasham \* \* \* came to his death \* \* \* at the hands of some person or persons unknown to plaintiff" (14). "And for a further reply" \* \* \* that he "came to his death \* \* \* from a gunshot wound *inflicted upon him* at the hands of some person or persons unknown to plaintiff" (16). The allegations by plaintiff are that Neasham did not kill himself, and that some other person killed him. This claim she again asserted by her counsel in his opening address to the jury (75) "the plaintiff on her part, will contend as to that point that the insured came to his death at the hands of some person or persons unknown—some person or persons *other than the insured.*" There was no issue of accidental shooting; that it

was an intentional shot that caused the death is alleged and conclusively established by the evidence.

Neasham was shot in broad daylight about the time he reached the place where his body was discovered about ten o'clock. The place was two to three miles from the place where he had been seen between 8:15 and 8:45 o'clock that morning. To walk the distance between these two places probably took him until about ten o'clock. He was not, of course, asleep when he arrived there, and even if he, having a comfortable home, had left it to walk from two to three miles along a railroad track to lie down in an oil-pit for the purpose of sleeping, he would not have had time to go to sleep before the attack, if any, would have been made upon him. The would-be murderer would soon have discovered that he was attacking a formidable man—a six-foot, two hundred pound, strapping ranchman (179, 180, 203), armed with a loaded 32-caliber pistol. A murderer does not court his own destruction by being particular where and how he shoots his victim, especially when that intended victim is a powerful man confronting him with a 32-caliber Savage automatic revolver. Would a murderer have risked his life struggling with Neasham in an effort to shove a pistol down his throat? Of course not—incredible—absurd!

Of course Neasham would not have succumbed to such an attack without a desperate struggle. Yet his clothing, the ground and his body showed none of the signs which would have inevitably followed such a conflict.

Two disinterested witnesses, the coroner and the undertaker who saw the body before it was disturbed, testified that the clothing was not disarranged. Theirs is the only testimony on the subject. The body was clothed with the usual outer apparel—shirt, collar, necktie, vest, coat and trousers (97, 159), none of which was disarranged, or disturbed—not even the collar or necktie (97, 172).

Neasham's feet were lying almost in the north wheel track of the wagon road running through the bottom of the pit (95, 179. See photograph 317 and explanation 154). Describing the nature of the soil where the body lay as it was within an hour after the body was discovered, the coroner testified that the bottom of the pit was sand and fine gravel, which was soft and damp (94, 95), and the sheriff testified that the soil was of such quality that its top surface would be dry after a freeze and a thaw (151). An examination made the following day of sandy ground from 100 to 125 feet on the other side of the railroad tracks north of the pit showed that there had been a thaw recently, leaving the ground soft (235), so it may be that the ground where the body lay had thawed not long before Neasham got there.

The soil, soft and damp, would have clearly shown a struggle in the pit, had there been any, involving, as it would, a stamping and tearing of the ground. Yet, what did the search of the coroner and the sheriff disclose?

These men were there in the performance of their official duty—the duty to discover what killed Neasham. The coroner examined the ground around



where the body lay to see whether or not there was any evidence of struggle, or other persons being near the body (98) and the sheriff also examined the north bank of the cut to see if any human tracks had come down there, and also the south bank, and a number of feet—possibly fifteen or twenty—around the body (158, 159) the coroner found were the foot-tracks *of one person that led to where the body lay* (99)—these tracks showing distinctly and clearly (100). The sheriff—an officer of years' experience and a close observer of such matters (158)—could find were “three tracks leading down to where the body was lying, *one track leading to the spot*, two other tracks leading to within about eight or ten feet of the spot—those tracks turned and went back” (158). He found nothing on the north bank above the body and nothing on the south bank on the other side of the road about eighteen feet south of the body (95). The only other witness who testified regarding the ground near the body was the undertaker, and he said: “Well, I observed a few tracks going from the east toward the body; I did not take much interest in that. I was interested in other matters.” Burke, a witness for plaintiff, testified: “I examined the ground about the place for tracks, and for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there” (233, 234). Evidently Mr. Burke found no indications of other people having been there or any indication of a struggle having taken place there, or he would have testified in regard thereto, and he did not so testify. The testi-

mony of these three witnesses standing undisputed, conclusively establishes the fact that there was one line of foot-tracks, *and only one*, which led to where the body lay. The condition of the soft, moist ground, untrampled, untorn and unmarked except for the footprints referred to—precludes any reasonable inference that someone attacked Neasham there and, shoving a gun into his throat, shot out his life. Neasham, six feet tall, weighed about two hundred pounds (179, 180). Yet the ground showed no signs of a 200-pound body having been dragged over it. The coroner and the sheriff were looking for just such signs but found none.

Two or more persons could have carried the body there, but had two or more persons done so, they would have left foot-tracks, at the spot where the body lay, and the testimony without contradiction, or question, establishes that there was only one line of footprints leading to the body, and none coming away from the body.

The Condition of Neasham's Clothing and the Ground Showing No Signs of His Having Been Pushed or Shoved from the Railroad Tracks Down the Bank to Where He Lay.

The sheriff in particular examined the north bank of the pit which sloped up to the railroad tracks but he found no tracks there, and nothing else noteworthy regarding its appearance (158, 159). Ex-sheriff Burke examined the ground (233). Had the body been shoved down that bank the ground, of course, would have been disturbed and detected by both the sheriff and ex-Sheriff Burke.

Moreover, had an attack been made while Neasham was on the railroad tracks, and the body pushed down the bank, would not his clothing have been disarranged or disturbed and how could the line of tracks at the bottom of the pit leading to the body have gotten there, and no tracks returning from the body?

The Footprints Leading to His Body Made by Neasham Himself.

The testimony is that there was only one line of tracks leading to where the body lay—tracks of only one person; these tracks stopped at the body; they did not return; no testimony that there were any tracks leading from the body; the only reasonable inference that can be drawn from the testimony is that Neasham himself made the tracks that led to the spot where the body lay; Neasham's body was found there because he walked there. One person could not have carried the body there,—it was too heavy; no one dragged the body there, there was no evidence thereof. Further, it is highly improbable that a murderer would drag it there—why should he? The soft, moist, sandy ground and Neasham's clothing showed no signs that his body had been dragged there. The body was not pushed from the railroad tracks down the embankment—neither the ground nor Neasham's clothing showed any signs of it. Sheriff Ferrell, ex-Sheriff Burke and the coroner all testified concerning the oil-pit and its surroundings, but no evidence or indications found suggesting foul play or an attack upon Neasham by anyone.

On the day and after the body was discovered, a number of people visited that vicinity (153). The foot-tracks discovered the next day by witness Burke may have been made by some of them. There is no evidence that they were made on the day Neasham left home and before he shot himself or was shot. The testimony is merely that there were tracks. It does not appear how many tracks or whether there were tracks of more than one person, or whether there were enough tracks, or the tracks were of such a nature as to indicate that an attack might have been made there upon a six-foot, 200-pound powerful man, armed with a 32-caliber Savage automatic pistol, and a gun shoved into his throat and fired. Had Burke, an experienced police officer (220), whom plaintiff's attorney took there to see if there was any evidence of an attack upon Neasham, found anything except just tracks, he would have testified to it when called by plaintiff and asked what he observed there (235).

The presence of tracks 100 to 125 feet north of Neasham's body the day after his body was discovered shows at most that someone had been there at some time. But it is no evidence that anyone was there about ten o'clock the morning of the day when Neasham arrived in that vicinity. When Neasham was seen between 8:15 and 8:45 walking on the railroad tracks easterly toward the pit, he was alone (92). Lalone who discovered the body was, at the time Neasham was shot, walking on the railroad tracks westerly toward the oil-pit which was near him (114). The view along these tracks was unob-



structed (photograph 315). Yet Lalonde saw no one in that vicinity except two men walking on the tracks about 150 yards west of the place where Neasham's body was found, and approaching him. When they came up to him while he was looking down from the railroad at the body, he recognized one of these men, Brown, as an acquaintance. The other man, Rudolph, he did not know (115).

#### Neasham not on the Railroad Tracks When He was Shot.

Neasham's death was practically instantaneous (310, 311, 198). When Lalonde discovered his body in the pit he was breathing heavily (114, 116, 121, 122). If Neasham was shot on the railroad tracks, it must have been very soon before Lalonde discovered the body. Yet Lalonde, coming along the tracks with a clear view before him, did not see Neasham there or anyone else except Brown and Rudolph approaching about 150 yards distant. And Brown testified he did not see anyone in the vicinity except Rudolph, with whom he was walking, and Lalonde.

#### No Evidence to Connect Lalonde, Brown or Rudolph With Neasham's Death—Evidence Strongly to the Contrary.

Lalonde, a sheepshearer (116), was walking on the railroad right of way from Sparks where he lived (114, 115), to Reno about ten o'clock Saturday morning. Brown, who was stopping in Reno at the Clarendon Hotel (118), and Rudolph, who, then residing at that hotel (121), had just met him there (123, 118), were taking a walk on the railroad right

of way toward Coney Island and Sparks. Nothing suspicious about that—a very natural thing to do.

### Their Conduct Proof of Innocence.

As they looked from the railroad track down at the body below what they saw—a man lying very still (114), a pistol close by his body (115, 116) about three or four inches from his hand (122), breathing heavily (114, 121), blood on his mouth and coat (116)—convinced them that the man had shot himself (119, 121). What were they to do? Here was a large man, shot in the head, all but dead from a pistol shot apparently fired by himself. They could not help him. The obvious and sensible thing to do was to notify at once the authorities who could do what was necessary. And this is what they did. They went at once to a private house and telephoned the police (115, 117, 118, 119, 121, 122). The police! Had they or any of them murdered Neasham, would they have notified the police? Of course not. Having summoned the police, they went back to the place on the railroad track from which they had looked down on the body (119, 115, 121), and found that Neasham had stopped breathing and was apparently dead (115, 122, 123), and they waited there until the sheriff (115, 117, 121) and the undertaker (177) arrived shortly thereafter. Would they have done this had they or any of them murdered Neasham? Certainly not.

Then they went down into the pit with the sheriff and the coroner, who examined the body and surroundings (116). Two of them, at the undertaker's request, went to a near-by house and telephoned for

a wagon in which to remove the body (178). They came back and, with the man they had left, went to Reno with the sheriff (122, 177). Is this the way murderers would have acted? And although they apparently had ample opportunity to disappear, we find them two days later testifying at the coroner's inquest (114-123, 178, 179). Upon such testimony, how could an inference even of suspicion against these men be reasonably drawn? It couldn't be.

Another circumstance makes such an inference even more preposterous. At the coroner's inquest both Lalonde and Rudolph *volunteered* that when they found the body, they could hear Neasham breathing heavily (114, 121). The questions put to them did not require them to disclose this fact. Would murderers have volunteered such information, establishing as it does that they were not far from Neasham at the time he received the wound which caused his instantaneous death? Obviously not.

No Material and Substantial Evidence That Neasham Did not Shoot Himself—The Blood on the Elbow of the Right Coat Sleeve.

Chick, the undertaker, examining the body with the sheriff and undertaker for the first time, testified "the mouth was covered with blood; the wound I could not see. \* \* \* It was inside the mouth," saw blood on Neasham's coat (171, 172) at the elbow of right sleeve (181, 182). Lalonde, testifying at the coroner's inquest two days after he discovered the body and over a year before Chick testified, saw, as he looked over the bank, blood on Neasham's coat

(116). The only blood on the coat was at the elbow of the right sleeve (181, 182). The witnesses who testified as to the position of Neasham's right arm were the sheriff, the coroner, Lalonde and Chick. Of these Lalonde and Chick only observed the blood on the coat, and testified concerning it; the coroner, although asked what he saw in reference to the physical condition of the body (102) and as to what he found on the body (99), did not mention that he saw any blood on the coat, and the sheriff, although asked to state fully what he found (151), said nothing about there being blood on the coat. The only reasonable inference that can be drawn is that Lalonde and Chick observed this fact, while the others did not.

It is undisputed that there was blood on the elbow of the right coat sleeve. It is undisputed that Lalonde and Chick saw blood on the coat before the body was disturbed. It is certain they could not have seen it, had the elbow been underneath Neasham's body, and it conclusively follows that the right arm from the hand to and above the blood spot at the elbow was not covered by Neasham's body. As testified by Chick, it was free and clear of the body (171, 172). There is nothing in Lalonde's testimony to the contrary "one hand was up off the ground like this (indicating)" (116).

How the blood got on the elbow of the coat sleeve is easily explicable. Chick, testifying over a year after he saw the body, did not remember whether Neasham's head or mouth was lying on his right arm (183). No one testified how the head was lying ex-



cept the sheriff who said it was lying up the slope from the bottom of the bank (151). The body was lying on the right side (96, 116, 150, 171).

After the body was found blood was oozing from the mouth and nose (102), and it probably gushed or spurted when the wound was inflicted. Now, these circumstances are entirely consistent with Neasham's having shot himself. After holding the pistol in his mouth with his right hand and firing the shot, his right arm and body would naturally fall back on the slope, and as the body was inclined to the right, it would naturally settle in that direction, bringing his head in contact with the right arm so that the blood gushing or spurting from the nose and mouth would fall on the right elbow. It may be that in the further settling of the body, the head fell away from the arm. Certainly the presence of this blood on Neasham's sleeve does not in the slightest degree tend to show that he was murdered. It is not evidence material and substantial, tending to show that he did not destroy himself. It is a fact entirely in harmony with the inference that he did take his own life.

#### The Testimony Regarding the Trigger of the Pistol When Found by Neasham's Body.

The pistol was found on the slope of the bank from three to eight inches below Neasham's right hand (96, 116, 122, 152, 156, 172), the muzzle sloping downward with the sand or soft dirt in it (156). The sheriff who picked it up (104, 151) and examined it (108) handed it to the coroner, who looked at it and handed it back to the sheriff (105, 151). The sheriff testified that when he picked up the pistol *the ham-*

*mer was back, a loaded cartridge in the chamber (156), that all that would have been necessary to discharge it was to pull the trigger (169), and that the pistol was in practically the same condition when he delivered it to the coroner at the inquest, except that the dirt had dropped from the muzzle, he had removed the loaded shell in the barrel and taken the magazine out of the gun (157). Upon cross-examination, the sheriff was asked if he testified at the coroner's inquest and if he were asked at such inquest certain questions among them being,—*

“Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber, and there is nine in the magazine.  
 \* \* \* Did you so testify? A. No, sir, I did not. I will explain my testimony. \* \* \* Q. Now, did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger? A. I did not.” (166–167.)

There is no evidence in the record that he did so testify. True, there was read in evidence, over objection, a part of a paper purporting to be a certified copy of the record of proceedings at the coroner's inquest and this paper reports the sheriff as saying what he emphatically denied he said (251, 252). However, there is no evidence that this paper correctly reports what the sheriff said. No one so testified. The testimony on this subject is that it is *not* a correct report—the testimony of the sheriff, a disinterested witness. The sheriff did not sign it; he never saw it (167) and there is no reason to disbe-

lieve his—the only—testimony on the subject, that it is an incorrect report.

There is no evidence even that it is the transcript of the stenographer who took down the testimony. The stenographer was not a witness at the trial, did not identify it as a copy of the transcript. Had the stenographer, as a witness, identified it as the transcript, the witness might, upon comparing it with the stenographic notes, have found that the part read in evidence was not correctly transcribed. It is probable, in view of the sheriff's denial, that the notes read: "The safety *is* on the trigger," and were incorrectly transcribed as "The safety *was* on the trigger." Or the sheriff in giving his testimony may have said " \* \* \* that the *safety's* on the trigger" and it was written "that the safety was on the trigger." At any rate, that is probably what the sheriff said because, in the first question: "Is this in the same condition as it was?" he said "No"; and then his method of showing the difference in condition was to state the condition of the pistol when produced at the coroner's inquest in the particulars in which it differed from its condition when picked up. And when the question was again asked, "Is it in the same condition?" it is very *improbable* that he would have reversed his mental process by describing the condition of the pistol when picked up in the particulars in which it differed from its condition when produced at the coroner's inquest. Indeed, his method of explanation had not changed when he began his answer, for he said: "It *is* [not "was"] in the same condition with the exception," etc., and then the natural,

simple way of explaining how it *is* not in the same condition would be to state its condition then in the particulars differing from what its condition *was* just as he had done in answer to the first question. Indeed, he is reported as saying: "I took the shell out of the chamber and there is nine in the magazine"—a condition, if he was correctly reported, subsequent to his picking up the pistol and existing at the time of the inquest. Is it not *unlikely* that with respect to the trigger alone, he would have described the condition of the pistol when picked up, and with respect to other conditions be speaking of conditions of the pistol existing at the hearing at the inquest? The sheriff said he did not, and his denial is sustained by common sense.

However, there is no evidence that the sheriff testified at the inquest that the safety was on the trigger when he picked up the pistol. There is positive evidence that the *safety was not on the trigger*, and that he did not so testify—the denial of the sheriff, backed up by the testimony of the sheriff and other witnesses explaining what is meant by and the effect of "the safety on the trigger."

No one is entitled to *speculate and guess* that the author of the transcript, if called as a witness, and confronted by the sheriff and the defendant's attorney, would have testified that the part read from the transcript correctly reported what the sheriff said at the inquest. It is *no evidence at all*—much less evidence material and substantial tending to show Neasham did not commit self-destruction.



## The Testimony Regarding the "Shell" in the Chamber of the Pistol When Found by Neasham's Body.

The sheriff testified that when he picked up the pistol the hammer was back and a loaded cartridge (156), loaded shell (169), was in the chamber, and that all that was then necessary to discharge it was to pull the trigger (156, 157, 169), which would have released the hammer, which was at full cock (156). The evidence conclusively shows that when he picked up the pistol there were eight cartridges in it and by it lay an empty shell (101, 105-108, 127, 128, 157).

The portion of the transcript of the proceedings at the coroner's inquest read in evidence at the trial reported the sheriff as having testified that he removed a shell from the chamber, and he testified at the trial that he did remove a shell from the chamber, that it was a loaded shell (169).

The word "shell" is ordinarily used as meaning "cartridge" or "loaded shell." The sheriff testified that he used the word in that sense at the coroner's inquest (169). And the record shows that he was accustomed to say "shell" when meaning "cartridge" or "loaded shell." On his direct examination he said that there was "a loaded cartridge \* \* \* in the chamber; the magazine contained *shells* \* \* \* " (156, 157). "I had removed the loaded shell in the barrel" (157). These "shells" are in evidence, Defendant's Exhibit No. 1 (128), and they are "eight loaded and one empty" (127). Again, the sheriff testifying as to the character of the wound said: " \* \* \* It was through the mouth, but

toward the back of the head, like concussion, tearing quite a large hole, and carrying everything in front of it, caused by the explosion of the *shell* fired from the gun" (161).

And this is not an unusual use of the word. Collins, who sold the pistol to Neasham, testified: "I did not have enough *shells* to fill it" (112). "I showed him how to throw the first *shell* in the cylinder of the gun" (129), and "The magazine was very tight to put the *shells* in" (143). Hill, the county treasurer, when producing the eight cartridges and the empty shell at the trial, referred to them all as "shells."

"Q. What, besides the revolver have you—in connection with the revolver?

A. Nothing at all except some of the *shells*.

Mr. KEPNER.—I can't hear you.

A. *Shells*.

Mr. HAWKINS.—(Q.) The magazine and *shells*?

A. Yes.

Q. How many loaded *shells* came into your possession from the coroner?

A. *Eight loaded and one empty.*" (127.)

Defendant's attorney referred to the cartridges as "shells" (112); so did the plaintiff's attorney (130), and so did the Court when he, referring to the chamber, asked Collins: "You have to pull the trigger every time, but it does not need any further throw of *shells* in it?" (129.)

We have the repeated statements of the sheriff that there was a loaded shell in the chamber when he

picked up the pistol; and even if he did say at the coroner's inquest that he removed a "shell" from the chamber, such statement is entirely consistent with what he said at the trial, as he was accustomed to use the word "shell" in its ordinary usage as meaning "cartridge" or "loaded shell," and the word was so used at the trial by defendant's attorney, the plaintiff's attorney and the Court himself. There is, therefore, no evidence whatever that there was an *empty* shell in the chamber, and the evidence establishes beyond the shadow of a doubt that there was a loaded shell or cartridge there, and the hammer back.

#### The Testimony Regarding the Scar, Dent or Depression.

When they examined Neasham's body at the pit upon their arrival there Saturday morning, the sheriff, the coroner and the undertaker—all disinterested in the outcome of this litigation—saw no other evidence of injury to Neasham than the blood coming from his nose and mouth. Not one of them, not even the sheriff—a trained observer charged with the duty of finding evidence of crime, if any—saw a scratch, a cut, a break, a bruise, abrasion, discoloration or anything else on Neasham's body suggestive of a wound or of his having recently been injured, except the blood coming from the nose and mouth (159, 102, 173).

If they saw on Neasham's head what the record shows was there, a mark variously described as a "scar in front and under the hair—a white streak" (174), "about an inch and a half long, starting at

a certain part of the frontal bone and running in under the edge of the hair \* \* \* very slight in depth \* \* \* like a white streak in the flesh where it had healed" (183), "whitish in appearance \* \* \* and perhaps  $\frac{3}{16}$  inches wide" (185), or "over the right eye running from the forehead, what appeared to be a dent, about an inch or  $1\frac{1}{4}$  inches long in the shape of a crescent" (223), "about  $\frac{1}{4}$  of an inch deep \* \* \* right around the edge of the hair" (224), or "a depression above the right eye, next to the hair in the forehead \* \* \* about  $1\frac{1}{2}$  inches long" (239), and "about one-eighth of an inch deep" (240), or "a scar on his forehead \* \* \* about an inch and a half long and extending upward and backward, from about the center of the right side of the forehead \* \* \* extending back into the hair, \* \* \* maybe three-sixteenths of an inch deep" (245), or "on his right forehead, just about the hair-line, \* \* \* a dent, apparently the size of a lead-pencil, or a little larger and possibly two inches to three inches long" (262), "running from the upper forehead toward the ear, along close to the hair-line" (263),—if they saw this, they did not consider it a wound or injury, for when asked, the coroner testified he found no other wounds upon the body than that evidenced by the blood oozing from the mouth and nose (102), and the sheriff testified that he did not find any other injury than that in the mouth (159), and the undertaker testified that he did not see any blood or fresh wound or anything on the body other than blood covering the mouth (173).



The next day, Sunday, the coroner examined the body at the undertaker's parlors and he found no wound on the body except that in the mouth (104). So if he then saw the scar, dent or depression above described, he did not consider it a wound.

On Saturday after the body was removed from the pit to the undertaker's parlors and was undressed, the undertaker saw the mark which he described as a "scar in front, and under the hair \* \* \* a white streak"—not a black and blue place, not a cut, not an abrasion of the skin (174), not a breaking of the skin (186)—about an inch and a half long, very slight in depth, "like a white streak in the flesh where it had healed" (183), "running back into the hair" (184), "whitish in appearance an inch and a half long, and perhaps three-sixteenths of an inch in width" (185), having the appearance of being old (185, 186), as if it had *not* been made recently (186), judging from the experience which he had had with scars (187), having no blue or black spot around its vicinity and showing no breaking of the skin (186) or blood or discoloration (187). It does not appear whether he saw it that day when he first examined the body at the pit, but if he did then see it, he then as well as afterwards did not consider it evidence of a fresh wound (173), but, on the contrary, evidence of an old wound (185, 186).

Burke, an experienced police officer, plaintiff's witness and certainly not prejudiced in favor of defendant, did not, if he saw the mark when the undertaker showed him the body on Sunday at the undertaking parlors, consider it an injury, for he testified he did

not notice any injury of any character except the wound in the mouth (233).

Dr. Gibson, a doctor of medicine for thirty-five years (191), county physician (192), summoned by the coroner to hold a postmortem on the body on Saturday at the undertaker's parlors (193) and then holding such postmortem apparently in the performance of his official duty as county physician to find any injury or wound connected with Neasham's death, found no injury or wound except that in the mouth, for answering the question (192),

“Please state fully, and in your own way, what that postmortem disclosed; what you found, what you saw and what you did in making this postmortem on the body of Mr. Neasham, *stating specifically and definitely all the wounds that you found, the nature of them, and where they were, and all about it.*”

described the wound in the mouth and the star-shaped fracture at the back of the head forced from the inside but said nothing about the mark (192-195). He very probably saw the mark. He was there for the purpose of making a careful, close examination. The undertaker had the body undressed preparatory for the doctor's postmortem (174); the undertaker had seen the mark when making this preparation (174) and Dr. Gibson must have seen it and examined it. Yet, although asked to state specifically and definitely all the wounds that he found, the nature of them and where they were (192), he did not mention it.

Dr. Gibson, examining the body on Saturday, the day Neasham was killed, with the purpose of finding any and all wounds and injuries on it, did not consider the mark a wound or injury. Neither did the undertaker, who had previously examined the mark that Saturday. Neither did the coroner, who examined the body on Saturday at the undertaker's parlors and must have seen the mark; neither did the sheriff, an experienced police officer (160), who must have seen the mark that day when the body was lying in the pit.

The record discloses no dispute, and conclusively proves, to the exclusion of any other inference, that at the place where the mark appeared there was no cut; no broken skin; no abrasion; no blood.

Only one other witness testified to the appearance of the mark on Saturday, the day Neasham was killed—Thomas H. Curnow, the plaintiff's brother, naturally interested in her winning the case. He testified that "right in the bottom of this dent there was a blue mark, looked like coagulated blood under the skin" (262). Yet the undertaker, an unprejudiced witness, testified that there was no discoloration, not even a slight discoloration at the bottom or lowest part of the mark (186, 187). Ray Cool, Neasham's ward, testifying to the appearance of the mark, that the skin was not broken (226), said that at the time he thought he detected, when he looked at it very closely, some slight lines of blue, very fine (226, 227), "there seemed to be, there was a fine streak of blue in the bottom—very fine, thread-like streak of blue at the bottom of the dent \* \* \*

a fine blue line \* \* \* very light," hard to see, so that if it was discolored at all, it was very slight. Edward Neasham, Neasham's son, testified that when he saw the body the same day Cool did, Monday, he observed the mark, and describing it he made no mention of any blue line or discoloration (245). Myrtle Raymond, Neasham's daughter, testified that when she saw the body at the undertaker's parlors on Sunday evening she noticed the mark, and describing it made no mention of any blue line or discoloration (239).

Dr. Ascher, the family physician for over eleven years (267), testified that when he saw the body at Neasham's home on Monday he did not observe the mark which he termed a "bruise or scar" until his attention was called to it, and he located the bruise or scar on the left side (264); that he then "simply looked at it, and possibly felt of it, but paid no particular attention to it" (268), and did not remember whether there was any discoloration, or at least, if he did see any discoloration, it was so slight as not to attract his particular attention, or to impress him enough so he could remember anything about it.

This is all the testimony there is as to whether there was a "blue mark" at the bottom of the scar, dent or depression. The undertaker said there was none. Edward Neasham, Neasham's son, did not mention any. Myrtle Raymond, Neasham's daughter, did not mention any. Dr. Ascher, the family physician, did not see any. But Ray Cool, Neasham's ward, said he saw "a very fine, thread-like streak of blue \* \* \* a fine blue line \* \* \* very



light," hard to see, and if it was discolored at all, it was very slight. And Thomas Curnow, plaintiff's brother, said "there was a blue mark, looked like coagulated blood under the skin."

Thus, the evidence conclusively shows, to the exclusion of any other reasonable inference, that the scar, dent or depression was whitish and that the utmost which could be fairly or reasonably inferred as to whether there was any discoloration whatever is that there was at the bottom of the scar, dent or depression a blue mark, looking like coagulated blood under the skin, but a very fine, thread-like line or streak of blue, hard to see, very light so that the blue was very slight and escaped the notice of four witnesses who saw the scar, dent or depression—the undertaker, the family physician, Neasham's son and Neasham's daughter.

No witness testified that this place on Neasham's forehead along the edge of his hair was a bruise, wound or injury on the day he observed it. The undertaker described it as a "scar—a white streak—like a white streak in the flesh where it had healed" (183). Ray Cool, Neasham's ward, called it "a dent in the shape of a crescent" (223) and a "depression" (224). Edward Neasham, Neasham's son, styled it a "scar" (245). Thomas Curnow, plaintiff's brother, termed it a "dent" (262) and an "indenture" (263). He also said the indenture was "bruised in," but he did not say *when* it was "bruised in" or that the "indenture" was, when he saw it, a bruise. Dr. Ascher, the family physician, said his attention was called to a "bruise or scar,"

but he did not testify which it was (264), and could not say that it was of recent origin (267). The sheriff did not see any wound or injury other than that in the mouth and the back of the head (159); neither did the coroner (102); neither did the undertaker (173); neither did Dr. Gibson, who performed the postmortem (192).

Let us see, then, what evidence, if any, there is that this scar, dent or depression was a wound, bruise or injury inflicted on Neasham the day he died. For if there is no material, substantial evidence tending to show it was, then unquestionably there was no evidence for the jury to weigh as to whether or not someone that Saturday morning attacked Neasham and struck that scar, dent or depression into his forehead.

First, could this *possibly* have happened and leave no cut, no broken skin, no abrasion, no blood, nothing but a whitish scar, dent or depression one-eighth to one-quarter inches deep and about one and a quarter inches long and a fine, thread-like line or streak of faint blue—hard to see—at the bottom? Obviously to produce a depression of such depth would require a blow of considerable force. So testified the plaintiff's expert witness, her family physician, Dr. Ascher (266, 267), and he also stated that the depression appeared to have been produced by a more or less blunt instrument (267) and might have been produced in innumerable ways (267), and witness Cool suggested a pipe (225). Neither, however, stated *when* he thought the blow had been struck.

And yet there was no cut, no break of the skin,

no abrasion, no blood! No wonder plaintiff's expert witness and family doctor, coming as such "in close contact with Mr. Neasham over a period of eleven years" (267) and who, when the mark was pointed out to him before Neasham's funeral, did not regard it of sufficient consequence to "take any particular notice of it" (266), although he would naturally be particularly interested in any evidence of foul play—no wonder Dr. Ascher could not testify that the scar, dent or depression was of recent origin. He said it was *impossible* for him to do so (267). He, an experienced physician, having close professional relations with Neasham for over eleven years, said it was *impossible* to testify that this mark was of recent origin. No witness said it was. How, then, could there be any evidence for the jury as to whether or not it was of recent origin? There wasn't any. Common sense, as well as expert testimony, forbade there should be any.

Dr. Ascher found it impossible to conclude that the mark was of recent origin, he was able to *speculate* about the absence of discoloration—theorize as to whether when death immediately or shortly afterwards follows a blow sufficient to produce such a mark, there would not be discoloration. He said "there would be less tendency to have any discoloration, or possibly any at all" (270), because with death the blood stops circulating (270). He did not say there would not be discoloration, but merely that such tendency would be *possibly* less.

This *possibility*, so far as based upon immediate death stopping circulation of the blood, can have no

bearing on this case because, although Neasham's death was practically instantaneous, still his heart did not cease beating until about a half hour after his body was discovered; the undertaker testified that when he, with the coroner and the sheriff, examined the body at the pit, Neasham's heart was slightly pulsating (176) and the circulation of his blood had not stopped, for the coroner testified that the blood was oozing from his mouth and nose (102).

The balance of the assumption upon which the possibility was based is that death followed shortly after the blow. The doctor's hypothesis was: "If death had taken place immediately, or a short time afterward." How short a time he had in mind does not appear. The reason he gave for the possibility was the ceasing of the circulation of blood, so he must have had in mind a time so short as almost immediately to follow the blow. But he did not testify that had the blood continued to circulate for about a half hour after the blow was struck—and the blood did circulate for about a half hour after Neasham was shot—the tendency to discoloration would be possibly less. His statements as to what might be possible, based upon an hypothesis which no one can say has the support of any evidence in the record, is, therefore, no evidence at all.

The speculative nature of the doctor's testimony is even more manifest as we consider it further. He testified that if the mark was caused by a blow, it was possibly of sufficient force to break the capillaries and cause the blood to come out (271). So the most that the doctor said was that the tendency of a blow



sufficient to produce the mark to cause discoloration would be *possibly* less if death ensued immediately or shortly afterwards, and that such a blow was *possibly* of sufficient force to produce discoloration. To be sure, he said that a blow of sufficient force to knock Neasham down would not necessarily have caused discoloration (272). But he did not say, and it does not appear in the record, that a blow of sufficient force to produce the mark did not exceed the force necessary to knock Neasham down. He said that the capillaries at the place where the mark was are more difficult to break by a blow than are capillaries in other parts of the body because of the nature of the tissue, *and because of the hair protecting the place as the hair could have been very easily down*, although he did not know whether it was or not (273), and there is nothing in the record tending to show that it was.

The doctor correctly appraised his own testimony; he knew, what is perfectly obvious, that he was guessing, speculating, and so he said it was impossible for him to deduce that the mark was of recent origin (267). So it is for anyone else. Based upon an hypothesis unsupported by any evidence, and because purely speculative, his testimony was no evidence that someone struck Neasham on the head and then shoving a pistol into his mouth shot him.

One, and only one, opinion of the doctor was based upon any evidence. The evidence is very strong—practically conclusive—that the mark was a scar. Asked what is the shortest time within which a scar from a wound may be formed, the doctor said sev-

eral weeks probably, and then said it may form in probably a week (273); that “an ordinary scar at first is red in color, and gradually fades out, takes on more or less the appearance of the surrounding skin”; that the whiteness would come gradually and may cover a period of several years (274). This demonstrates that if the mark was a “scar,” it could not possibly have been the result of a blow received by Neasham the day he died.

It should also be noticed that the doctor, called by the plaintiff, did not explain how a blow sufficient to produce the mark could have been struck and leave no cut, no broken skin, no abrasion, no blood. There is nothing in the record to explain this, for the obvious reason that it would be impossible.

The Court will notice that—

1. The mark (a) showed no cut; (b) showed no broken skin; (c) showed no abrasion; (d) showed no blood; (e) if a scar, could not have been struck into Neasham’s head on the day he died.

2. The coroner found no other *wound* than that in the mouth.

3. The sheriff found no other *injury* than that in the mouth.

4. The undertaker found no *fresh wound* other than that in the mouth.

5. Burke, the experienced officer, witness for plaintiff, did not notice any *injury* of any character except the wound in the mouth.

6. The county physician who performed the autopsy found no *injury or wound* except that in the mouth, and back of head.

7. The family physician—Neacham's physician for over eleven years—when his attention was called to the mark *paid no particular attention to it*.

8. No witness testified that the mark was, on the day he saw it, or on the day Neasham died, a bruise, wound or injury.

9. There is no evidence that if the mark was struck into Neasham's head just before he was shot, and he died and his blood ceased to circulate about a half hour after he was shot, (a) the mark could possibly be whitish as it was; (b) the mark could show no cut, no broken skin, no abrasion, no blood, as was the case here.

10. There is no evidence that Neasham was attacked and struck, and the evidence shows conclusively, to the exclusion of any other reasonable inference, that he was not attacked, but that he committed self-destruction.

To be added is the fact that the skin where the mark was—showing no cut, no break, no abrasion, no blood—adhered tightly to the bone. So testified Neasham's ward, Ray Cool, and he said when he worked this skin with his finger, it was not loose, did not slip around, and was firm and solid "like it was stuck to something" (227, 228). These are not the characteristics of skin which had just been struck by a blow of sufficient force to produce a mark of such depth. They are the characteristics of skin injured long before.

The above evidence conclusively establishes that the mark could not possibly have been produced by a blow struck Neasham on the day he died.

It is true plaintiff's daughter (239, 240), her son (245), the plaintiff's brother (247), Neasham's ward (224), and the family physician (267) each testified to never having seen the mark before Neasham's death. But the plaintiff herself—and *this is significant*—Neasham's wife living with him for over twenty-four years (84), *did not testify that she had not seen the mark before* her husband died. If she had not seen it, would not her attorney, who questioned so many others on the subject, have questioned her so as to elicit such fact? Of course, he would.

Now, the mark was at the edge of the hair line (174, 183, 224, 239, 273), so that the hair might have covered the mark (273). This may have been the reason why the daughter, son, ward and family physician had not seen it.

At any rate, this testimony has no material and substantial bearing on the clear and undisputed evidence above outlined that the blow producing the mark could not possibly have been struck on Saturday. It does not explain the whitish appearance of the mark, the absence of any cut, broken skin, abrasion or blood; and the overwhelming evidence that no one attacked Neasham.

No reasonable man from such testimony could even hazard a *guess* that Neasham was murdered. It is no evidence that Neasham did not commit self-destruction.

#### The Testimony Regarding Motive.

There is no evidence that anyone had a motive for murdering Neasham—none that he ever had an



enemy or had done anything which might excite enmity. The evidence establishes that Neasham was not robbed—hence no one evinced a motive to rob him. Neasham was satisfied that his purpose in buying the pistol about sixteen hours before his death was met by loading it with nine cartridges, and he was absent from his home the night immediately preceding his death. All the evidence excludes the inference that he was murdered, or that he accidentally shot himself. Reasoning by process of exclusion, it follows that he committed self-destruction.

It is not material that the record does not disclose what his motive was; it does appear (332) that his estate was insolvent and his financial affairs in a bad condition; and in the cross-examination of Mrs. Raymond, a daughter of plaintiff and deceased, that she testified at the coroner's inquest; she was then asked (242-243) if she were not asked the following questions and returned the following answers:

“‘Q. Did you know of any trouble that might have been troubling Mr. Neasham? A. Nothing definite; there are things that we think we can see, but nothing definite that we could seem to know that could put him into such a state. Q. Those were business worries? A. Yes.’ Were you asked those questions, and did you return those answers?

A. I don't remember a thing about it; at the present time I don't remember either the questions or the answers.

Q. You don't remember? A. I don't remember.”

And the record does establish beyond the shadow of a doubt that he destroyed himself, and, as a corollary, that he did so either because his mind was deranged or because *for some reason of his own he was tired of life.*

At the conclusion of all the evidence offered by both plaintiff and defendant, defendant moved that the jury be instructed to return a verdict for the defendant for reasons therein stated (Tr. 284-286).

The motion was denied; exceptions taken and allowed for reasons stated (Tr. 286-288).

Defendant requested the Court to give to the jury instructions No. 1 and No. 2 (Tr. 288).

The case was argued and the jury charged (Tr. 289-300). The instructions requested by defendant, Nos. 1 and 2, were refused. Defendant excepted to portions of the charge of the Court to the jury (Tr. 300).

Thereupon the jury, at 3:20 o'clock P. M., retired to consider their verdict, and at 5:10 o'clock P. M. returned into court with request "to have read the transcript of Sheriff Ferrel's evidence before the *coroner's* jury. \* \* \* And we want to hear read ex-Sheriff Burke's testimony before this jury."

"JUROR.—We would like to have ex-Sheriff Burke's evidence read as to the tracks he testified to having found on the *railroad.*" (Tr. 301.)

Thereupon testimony was read to the jury (Tr. 302, 303). The Court will observe that the testimony thus read to the jury as the testimony of ex-Sheriff Burke *is erroneous and misleading*, in that it

represented and stated to the jury that ex-Sheriff Burke testified that he observed tracks and a place where someone had been lying down in the gravel or oil-pit where the body of Neasham was found, when in truth the ex-Sheriff testified that the place where he observed the tracks and the place where someone had been lying down was at a point from 100 to 125 feet distant and across the railroad tracks from the gravel-pit in which the body of Neasham was found, as clearly appears from the record. (Tr. 223-235 and Plaintiff's Exhibits "D" and "E," Tr. 314, 315); while the testimony thus read to the jury was that ex-Sheriff Burke had found the conditions there testified to by him as existing in the gravel or oil-pit, shown in Plaintiff's Exhibit "D," and being the pit in which the body of Neasham was found.

After the jury had heard read such testimony it retired, and at 6:10 o'clock P. M. returned into court with a verdict for plaintiff in the sum of \$10,689.30. Judgment was entered but on motion for defendant execution thereon was stayed forty-two days, and defendant was allowed forty-two days within which to take such further steps herein as advised (Tr. 43), and thereafter stay bond was approved and filed and further orders made and entered concerning filing of petition or motion for new trial and bill of exceptions and reserving jurisdiction of the case; notice of and petition or motion for new trial filed within the time allowed; motion for new trial heard and denied; assignment of errors served and filed and petition for writ of error allowed, served and

filed (Tr. 43-72); and "Stipulation and Statement," etc. (Tr. 328-335).

### The Questions Involved and the Manner in Which They are Raised.

1. Error of the Court in overruling demurrer to the complaint (Tr. 9; Assignment of Error I, Tr. 52).

2. Error of the Court in overruling motion for defendant at close of plaintiff's evidence for nonsuit and to direct a verdict upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of \$10,000 (Tr. 84-87; Assignment of Error II, Tr. 52).

3. Error of the court in ruling and holding, under the pleadings and opening statement of plaintiff's attorney and plaintiff's proof in chief, that plaintiff had made a *prima facie* case; that the burden of proof was upon defendant to establish self-destruction of the insured (Tr. 87, 291; Assignment of Error III, Tr. 55-56).

4. Error of the Court in sustaining objections to questions propounded to Dr. Gibson, witness for defendant (Tr. 199, 200; Assignment of Error IV, Tr. 56-57).

5. Error of the Court in sustaining objections to questions propounded to Dr. Morrison, witness for defendant (Tr. 209, 210, 211; Assignment of Error V, Tr. 57).

6. Error of the Court in admitting, over objection of defendant, testimony of witness Burke as to what he saw on the ground February 28th, the day after the insured was discovered dead in the gravel-



pit (Tr. 235, 303; Assignment of Error VI, Tr. 58).

7. Error of the Court in permitting plaintiff, over objections of defendant, to offer in evidence that which purported to be portion of the testimony of witness Sheriff Ferrel before the coroner (Tr. 251, 252, 302; Assignment of Error VII, Tr. 58, 59).

8. Error of the Court in refusing to grant and in overruling and denying defendant's motion, at the conclusion of all the evidence, to direct a verdict and to instruct the jury to return a verdict for defendant (Tr. 284-286; Assignment of Error VIII, Tr. 59-61).

9. Error of the Court in refusing to give to the jury defendant's requested instruction No. 1 (Tr. 288; Assignment of Error IX, Tr. 61).

10. Error of the Court in refusing to give to the jury defendant's requested instruction No. 2 (Tr. 288; Assignment of Error X, Tr. 61-62).

11. Error of the Court in all, each and every part of its charge to the jury wherein and whereby the jury was authorized to determine any question of fact or theory concerning the death of the insured except that the insured came to his death from a gunshot wound *self-inflicted or inflicted by some person or persons other than himself*, and wherein and whereby the jury was instructed,—(a) that plaintiff had made a *prima facie* case; that the defense of self-destruction means the same thing as suicide; and is an affirmative defense, and the burden is upon the defendant to establish by a preponderance of the evidence, with reasonable certainty, that the death was the result of self-destruction, “rather than *accident*,

*mischance*” (Tr. 291); (b) that the term “self-destruction,” used in the policy and understood in the law “does not necessarily cover and include every instance in which a man dies as a result of his own act” (Tr. 291–292); (c) “if, on the other hand, the jury find that the shooting was done by the deceased, but that it was done *accidentally*, or was the result of *carelessness*, and without the intent or purpose of taking his life, then, under the evidence, the *plaintiff will be entitled to a verdict*” (Tr. 293); (d) “All I intend by this suggestion to you is, that if in your examination of this evidence you conclude you cannot account for the death of this deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with *some other theory* which you believe the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment” (Tr. 298); (e) “that the evidence must enable them to find that the death was the result of self-destruction, or of course the plaintiff would be entitled to recover. The burden, gentlemen of the jury, being upon the defendant to establish its affirmative defense that this death was the result of self-destruction, it follows \* \* \* that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, if it leaves you in doubt, then of course the defendant will not have sustained the burden of proof by a preponderance of the evidence, and *your verdict will necessarily be for the plaintiff.*” (Tr. 299–300; Assignment of Error XI, Tr. 62–66.)

12. The verdict of the jury is not sustained by the evidence (Tr. 72, 322; Assignment of Error XII, 66-68).

13. There was no testimony tending to sustain the verdict of the jury (Tr. 72, 322; Assignment of Error XIII, Tr. 68).

14. The verdict of the jury was contrary to the law (Assignment of Error XIV, Tr. 68).

15. Errors occurring during the trial, to which exceptions were taken, as appears from the record (72, 322).

16. Error of the Court in denying defendant's motion for new trial (Tr. 45-50, 18-42).

Specifications of Error Relied upon and Intended to be Urged.

Defendant specifies the following, as errors relied upon and intended to be urged for the reversal of the judgment herein, to wit:

1. Error of the Court in overruling the demurrer to the complaint and denying the motion to make the complaint more specific and certain, said demurrer being that the complaint is ambiguous and uncertain, in that it does not appear from said complaint whether insured was or was not guilty of self-destruction; that the complaint does not state facts sufficient to constitute a cause of action, and the motion being upon the grounds that the cause of action is founded upon a written contract containing the "self-destruction" clause, and it appearing that deceased died during the first insurance year, it is not alleged in the complaint whether or not the death of the insured cast plaintiff's cause of action upon

facts entitling plaintiff to recover the \$10,000, or a sum equal to the premiums under the contract which have been paid to and received by the company, and no more (Tr. 6-9; Assignment of Error I, Tr. 52).

2. Error of the Court in overruling the motion by defendant at close of plaintiff's evidence for non-suit and to direct a verdict for defendant upon the cause of action asserted by the plaintiff wherein she sought to recover \$10,000, the amount of insurance under said contract (Tr. 84-87).

3. Error of the Court in ruling and holding under the pleadings and the opening statement of plaintiff's attorney and plaintiff's proof in chief that plaintiff had made a *prima facie* case; that the burden of proof was upon defendant to establish self-destruction of the insured (Tr. 87, 291), for the following reasons:

This action is based upon a contract, Exhibit "A" to the complaint, in which, *inter alia*, the following appears:

"SELF-DESTRUCTION. In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more."

The action thus being upon said contract, conditioned under certain circumstances creating a liability in a given sum and under other circumstances creating a liability in a different sum, both sums being definitely specified in the contract upon which the cause of action was based; plaintiff, as a condi-



tion precedent to recovery, is required to allege facts, which, if true, would entitle her to recover the amount sought; death occurring within the first insurance year, as shown by the complaint, it was essential to and a condition precedent to plaintiff's right to recover the full amount of the policy that she allege and prove facts authorizing a judgment for the sum of \$10,000, that being one of the sums specified as to become due and payable upon the happening of certain events; no such allegations appear in the complaint, and no proof of such facts was made by plaintiff (Tr. 72-87; Assignment of Error III, Tr. 55, 56).

4. Error of the Court in sustaining objections of plaintiff to questions propounded to Dr. Gibson, and in refusing to permit defendant to state its offer to prove, as appears Tr. 199, 200, 202, said questions, to which objection of plaintiff was sustained, being as follows:

“Q. Can you state the difference between gunshot wound, or a pistol shot wound, made by the pistol being fired close to the object that it strikes, and when it is some distance from the object?”

“Q. If a pistol shot was fired with the pistol close to the anatomy of a human person, right up close to it, would there be any difference between the character of the wound thus made and the character of a wound received by a bullet from the same pistol fired at some distance from that object?”

“Q. Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by someone else?

“Q. What is your opinion as to whether the wound was inflicted by William C. Neasham himself or by another?” (Tr. 199, 200, 202; Assignment of Error IV, Tr. 56, 57.)

5. Error of the Court in sustaining objections of plaintiff to questions propounded to Dr. Morrison, as appears Tr. 209, 210, 211:

“Q. Assuming that testimony to be true, state whether or not in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?”  
\* \* \* (Tr. 209.)

“Q. Assuming the testimony of Doctor Gibson as true, particularly referring to the location of the wound, and the fact that the tongue, teeth, and lips were not injured, would it in your opinion be possible to have inflicted that wound by a bullet fired from a thirty-two automatic pistol, with the pistol outside the mouth of the deceased.” \* \* \* (Tr. 210.)

“Q. Assuming the testimony of Doctor Gibson as true—I will ask this question, your Honor, to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?” (Tr. 211; Assignment of Error V, Tr. 57.)

6. Error of the Court, in admitting, over objection of defendant, the testimony of Witness Burke as to what he saw on the ground February 28, 1915, the day after the insured was discovered dead, at a point from 100 to 125 feet distant and across the railroad tracks from the place where the body of Neasham was discovered in the gravel or oil pit, the record in reference thereto (Tr. 233-235) being as follows:

“Q. Tell the Court what you observed.

The COURT.—When was it; find out when it was.

Q. When did you see it?

A. I saw it on the 28th of February.

The COURT.—You didn’t see it the day that his body was brought in?

A. No, sir, not that day, I didn’t see it until the next day—the next day after it was brought in. Assuming that it was brought in on the 27th, I saw the body on Sunday, the 28th.”

\* \* \*

“Q. What examination did you make, Mr. Burke, of the so-called gravel-pit, shown in Plaintiff’s Exhibit ‘D’?

A. I examined the ground about the place for tracks, or for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there.

Mr. HAWKINS.—(Q.) That was on the 28th? A. On the 28th.

Mr. HAWKINS.—I object to the question on the ground it is incompetent, irrelevant and immaterial, being a whole day after the occurrence happened there.

The COURT.—That only goes to its weight, not to its admissibility. You may argue to the jury all these things that suggest themselves to your mind as weakening the testimony, but that only goes to its effect, not to its admissibility.

Mr. HAWKINS.—I would like to object to it as incompetent, irrelevant and immaterial at the present time, and it not being shown that the condition on the 28th was the same as the condition on February 27th.

The COURT.—Objection overruled.

Mr. HAWKINS.—Exception for the reasons stated.

Mr. KEPNER.—(Q.) Calling your attention to Plaintiff's Exhibit 'E,' and to the portion of the exhibit where the two men appear to be standing, I will ask you where that point is with reference to the oil-pit or gravel-pit, where the body was found?

A. The point where the two men were standing here is north of the oil-pit, and across the railroad track from that.

Q. How far is it, approximately, between those two points?

A. I should say it is a hundred and twenty-five feet.

Mr. HAWKINS.—(Q.) How far?



A. About a hundred to a hundred and twenty-five feet.

Mr. KEPNER.—(Q.) Did you make any examination of that place on the 28th of February?

A. Yes, sir.

Q. What did you observe?

Mr. HAWKINS.—I object to the question on the ground it is incompetent, irrelevant and immaterial, and it not being shown it was the same place and the same condition that existed on the day of the event being inquired about.

The COURT.—He don't have to show that under circumstances such as these. The objection will be overruled.

Mr. HAWKINS.—We ask the benefit of an exception.

The COURT.—Answer the question: What did you observe at that place—you mean where the men are standing, don't you, or are shown to be standing in that photograph?

Mr. KEPNER.—Yes.

A. I observed tracks in the ground there; the ground was soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down."

Also error of the Court in permitting to be read, and in erroneous reading of testimony of Witness Burke to the jury as shown at Tr. 301, 303, thereby impressing upon the mind of the jury the testimony of said Burke to the effect, as shown by the Tr. 303, that the examination and the facts testified as hav-

ing been found by said Burke were of and concerning the gravel-pit wherein the body of deceased lay when discovered dead or dying, when the testimony of said Burke was given in reference to the ground examined and conditions thereof across the railroad track and 100 to 125 feet distant from the pit in which the body of deceased was found, said record at p. 303 in reference to the testimony of said Burke so read to the jury being:

A. A. BURKE.

“Q. What examination did you make, Mr. Burke, of the so-called gravel-pit, shown in Plaintiff’s Exhibit ‘D’?”

A. I examined the ground about the place for tracks, or for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there.

Q. Did you make any examination of that place on the 28th of February? A. Yes, sir.

Q. What did you observe?

A. I observed tracks in the ground there; the ground was a soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down.”  
(Assignment of Error VI, Tr. 58.)

7. Error of the Court in permitting plaintiff, over defendant’s objection, to offer in evidence what purported to be a portion of the testimony of Witness Ferrel before the coroner, concerning the gun picked

up by the side of the body of deceased and the condition thereof (Tr. 251-252), said portion of said record so offered and read into the record, over objection of defendant, being:

“Mr. KEPNER.—I read the portion of the testimony of Charles P. Ferrell appearing on page 7 of the transcript, beginning with line 15. (Reads:) ‘Q. By Mr. Lunsford: Did you take the gun? A. Yes, sir, I picked the gun up. Q. It is here now? A. Yes, sir. This is the gun. Q. Is this in the same condition as it was? A. No; I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger. I took the shell out of the chamber, and there is nine in the magazine. Q. You have the empty cartridge now? A. Yes.’” (Tr. 252.)

Also error of the Court in permitting to be read the testimony of witness Ferrel to the jury, as shown at Tr. 301, 302, thereby impressing upon the mind of the jury the testimony of said Ferrel, said record at p. 302 in reference to the testimony of said Ferrel, so read to the jury, being:

#### C. P. FERRELL.

“Mr. KEPNER.—(Q.) Did you testify at the coroner’s inquest in Reno on the occasion when you say you delivered this gun to Mr. Unsworth? A. I did.

Q. And you were asked about this gun at that time? A. I was.

Q. I will get you to state whether you were asked this question by the district attorney: 'Q. Did you take the gun?' to which you answered, 'Yes, I picked the gun up.' A. I did.

Q. Then you produced the gun; and then you were asked this question, referring to this same pistol; 'Is this in the same condition as it was?' to which you answered, 'No, I removed the shell from the chamber, and there are nine shells in the magazine.'

A. Well, you are getting two questions together.

Q. The question and your answer. The question: 'Is this in the same condition as it was?' to which you answered: 'No, I removed the shell from the chamber, and there are nine shells in the magazine.' Did you so testify?

A. It is compounded in two questions.

Q. Now, the question was repeated: 'Q. Is it in the same condition?

A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber and there is nine in the magazine.' Did you so testify?

A. No, sir, I did not. I will explain my testimony.

Q. Now, did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger?

A. I did not." (Tr. 302, 303; Assignment of Error VII, Tr. 58, 59.)



8. Error of the Court in refusing to grant and in overruling and denying defendant's motion made at the conclusion of all the evidence offered by both parties to the case to direct a verdict and to instruct the jury to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint in so far as plaintiff seeks to recover the sum of \$10,000 as the amount of insurance under said contract, Exhibit "A" to the complaint, for the following reasons:

"1. That under the pleadings and evidence in this cause, and the law applicable thereto, there is <sup>no</sup> liability as against the defendant for, and the defendant is not indebted to the plaintiff in said sum of, \$10,000.

2. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit 'A,' attached to and made a part of the complaint.

3. That it appears from the record in the cause:

a. That 'In event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more.'

b. That the first insurance year under said contract, Exhibit 'A' to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

c. That said insured, William C. Neasham, during said first insurance year, and on, to wit,

February 27, 1915, committed self-destruction by a gunshot wound self-inflicted.

4. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insurance was not \$10,000, and, under the terms of said contract, Exhibit 'A' to the complaint, the plaintiff is not entitled to recover said sum of \$10,000, or any other sum or amount greater than a sum equal to the premiums, on said contract or policy, Exhibit 'A' to the complaint, which have been paid to and received by the company; and it appears from the record herein, and is admitted that the premium on said contract or policy, Exhibit 'A' to the complaint, was the sum of \$456.90, and no more." (Tr. 284-286; Assignment of Error VIII, Tr. 59-61.)

9. Error of the Court in refusing to charge the jury as requested by defendant's requested instruction No. 1 (Tr. 288), which reads as follows:

"The jury are instructed that under the evidence in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of Ten Thousand Dollars as the amount of the insurance under said contract, Exhibit 'A' to the complaint herein. You are therefore instructed to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint,

in so far as plaintiff seeks to recover a judgment of Ten Thousand Dollars as to the amount of the insurance under said contract, Exhibit 'A' to the complaint herein." (Assignment of Error IX, Tr. 61.)

10. Error of the Court in refusing to charge the jury as requested by defendant's requested instruction No. 2 (Tr. 288), which reads as follows:

"The jury are instructed that under the facts in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, and you are instructed to return a verdict for the defendant." (Assignment of Error X, Tr. 61, 62.)

11. Error of the Court under the pleadings and the issues joined thereby (Tr. 1-5, 9-13, 14-16), and the opening statement of plaintiff's attorney (Tr. 75), in all, each, and every part of its charge to the jury, wherein and whereby the jury was instructed,—that plaintiff has made a *prima facie* case; that the burden is on the defendant to establish, by a preponderance of the evidence, self-destruction; that "self-destruction," used in the contract, means the same thing as suicide; the proof must establish, with reasonable certainty, "that the death was the result of self-destruction, rather than accident, mischance"; that if decedent was accidentally killed, although death results from his own act, "it is not self-destruction or suicide so as to excuse a defendant's liability"; "If, on the other hand, the jury find that the shooting was done by the deceased, but that it was done accidentally, or was the result of care-

lessness, and without the intent or purpose of taking his life, then under the evidence, the plaintiff will be entitled to a verdict," and wherein and whereby the jury was instructed and authorized to determine any question of fact or theory concerning the death of the insured, except that insured came to his death from a gunshot wound self-inflicted or inflicted by some person or persons other than himself.

That part of the charge to which this error is specified appears in the record, Tr. 291, 292, 293, 298, 299, 300, and is as follows:

"The evidence shows without conflict, and in fact it is admitted, that the death of the insured occurred during the first year of the existence of the policy; and the main issue, therefore, which I have referred to is as to the manner of that death, since, under the evidence in the case, *the plaintiff has made out her cause of action entitling her to recover* the stipulated amount of insurance, unless that right is found by you to have been defeated by the act of the deceased in taking his own life.

If the insured died from any other cause than self-destruction, plaintiff must recover. If he took his own life, whether sane or insane, the verdict must be for the defendant.

The defense of *self-destruction or suicide*, which for present purposes *means the same thing*, is an affirmative defense, and the *burden of proving it rests upon the defendant* who asserts it. Suicide or self-destruction, being at variance with the ordinary human instincts, and



involving a wrongful act, is never to be presumed, but must be proved or established by evidence sufficiently satisfactory to overcome the presumption against it, and to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of the death of the person involved other than that of self-destruction. The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to overcome the presumption of the innocence of the deceased of the wrong involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, *rather than accident, mischance*, or violent injury inflicted at the hands of another.

The term 'self-destruction' used in this policy and understood in the law, does not necessarily cover and include every instance in which a man dies as a result of his own act. The term means, and is intended to mean, and is meant to express the instance where the act which produces death is done intentionally, and with the deliberate purpose of producing death. In other words, self-destruction contemplates a union or joint operation of act and intent. It is the intent with which the act is done which distinguishes it from death *resulting from accident or negligence*. If one is handling a deadly weapon or other instrumentality, in a negligent and careless manner, and as a result is *accidentally*

*killed*, in such an instance, although death results from his own act, *it is not self-destruction or suicide such as to excuse a defendant's liability*, for the intent is absent. In such case it is what is denominated an *accidental death*. Whereas, if the same act be done intentionally, with the purpose of taking his life, it is self-destruction in the sense in which that term is used in the policy. While the person whose act is concerned must be conscious of the fact that the act he does is dangerous and may produce death, it is not necessary under such a provision as that involved here, in order to relieve the insurer, that the person taking his life be conscious of the moral quality or consequence of his act, but only that he know that the means he employs will cause, or is calculated to cause, death or danger to his life.

The fact of self-destruction, like any other fact in a civil case not requiring some specific mode of proof, may be shown by circumstantial evidence, but the circumstances as the basis of such fact should, like any other character of evidence, be *such as to exclude* with reasonable certainty, *as I have indicated, any other theory or cause* to account for the death of the person involved.

Applying these principles to the evidence in this case, if the jury find that the act of shooting was done by the deceased, that it was done intentionally, and with the purpose of taking his own life, then, as I have said, whether he was at

the time sane or insane, the plaintiff cannot recover. If, on the other hand, the jury find that the *shooting was done by the deceased*, but that it was done *accidentally*, or was the *result of carelessness*, and without the intent or purpose of taking his life, *then under the evidence, the plaintiff will be entitled to a verdict.*” \* \* \* (Tr. 290–293.)

“You are permitted, if you see fit, to base your verdict upon a theory wholly separate and apart from that advanced by either counsel, under any circumstances appearing in the evidence which will warrant such a theory. Any theory which underlies the verdict of a jury must be supported by evidence in the case. All I intend by this suggestion to you is, that if in your examination of this evidence you conclude you cannot account for the death of this deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with some other theory which you believe the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment.” \* \* \* (Tr. 298.)

“The COURT.—Well, that is covered by the charge of the Court when it instructs the jury that the evidence must enable them to find that the death was the result of self-destruction, *or of course the plaintiff would be entitled to recover.*

The burden, gentlemen of the jury, being

upon the defendant to establish its affirmative defense that this death was the result of self-destruction, it follows, as I have heretofore suggested to you—perhaps counsel didn't notice it—that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, if it leaves you in doubt, then of course the defendant will not have sustained the burden of proof by a preponderance of the evidence, and *your verdict will necessarily be for the plaintiff.*" (Tr. 299, 300; Assignment of Error XI, Tr. 62-66.)

It being admitted by the pleadings that the insured came to his death from a gunshot wound—the defendant alleging that the insured came to his death as the result of a self-inflicted gunshot wound, while plaintiff in her reply alleges that the insured "came to his death \* \* \* from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff," and in plaintiff's opening statement asserts "the plaintiff on her part will contend as to that point that the insured came to his death at the hands of some person or persons unknown—some person or persons *other than the insured.*"

There was no issue of accident or mischance under the pleadings or under the contentions of the parties concerning which the jury could speculate or theorize, and accident, mischance, carelessness and all like words and phrases complained of were injected into the case for the first time by the Court's charge to the jury, thereby authorizing, permitting



and instructing the jury to find for the plaintiff upon a theory of the case which was not in issue as made.

12. There is no material and substantial evidence which, if credited by the jury, would in law justify the verdict of the jury in favor of the plaintiff (Tr. 72-322):

“1. The verdict of the jury, upon all the evidence, in so far as plaintiff sought to recover the sum of \$10,000 should have been in favor of defendant, for the following reasons:

A. That under the pleadings and evidence in this case, and the law applicable thereto, there is no liability against the defendant company, and the defendant is not indebted to the plaintiff in the said sum of Ten Thousand Dollars.

B. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit 'A' attached to and made a part of the complaint.

C. That it appears from the record in this cause:

a. That 'in event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more.'

b. That the first insurance year under said contract, Exhibit 'A' to the complaint was between the 10th day of July, 1914, and the 10th day of July, 1915.

c. That said insured, William C. Neasham, during said first insurance year, and on, to wit,

February 27th, 1915, committed self-destruction by a gunshot wound self-inflicted.

D. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insurance was not Ten Thousand Dollars, and under the terms of said contract, Exhibit 'A' to the complaint, the plaintiff is not entitled to recover said sum of Ten Thousand Dollars, or any other sum or amount greater than a sum equal to the premium on said contract or policy, Exhibit 'A' to the complaint which has been paid to and received by the company. And it appears from the record herein, and is admitted, that the premium on said contract or policy, Exhibit 'A' to the complaint, was the sum of \$456.90, and no more.

2. That the verdict of the jury, if for the plaintiff, under the evidence should have been only for the sum of \$456.90 the amount of the annual premium, but plaintiff in open court waived her right to a verdict and judgment for said sum of \$456.90." (Assignment of Error XII, Tr. 66-68.)

13. There is no material and substantial evidence tending to sustain the verdict of the jury (Tr. 72-322; Assignment of Error, Tr. 68).

14. The verdict of the jury was contrary to the law (Assignment of Error XIV, Tr. 68).

#### BRIEF OF ARGUMENT.

The judgment for plaintiff is not warranted, is unjust and should be reversed. We do not believe it

possible, in this age of our boasted civilization and the integrity of our judicial system for the just settlement of controversies, such a judgment can stand.

The jury, following the all but universal course in cases where the plaintiff is a widow and defendant a corporation, returned their verdict for the plaintiff. The trial court, as is the usual rule, denied the motion for a new trial. The result is this writ of error—seeking relief from the unjust, improper and unwarranted judgment.

The evidence of self-destruction is so clear, cogent and convincing, upon any view which can be *properly* taken of it, that reasonable minds cannot reach a different conclusion; if any reasonable, disinterested person, reading the record in this case, would not reach any conclusion other than that the insured committed self-destruction, why should the jury or Court reach any other or different conclusion?

We submit that to allow the verdict in this case to stand is to surrender human intelligence and to trifle with the underlying and undisputed facts in the case.

The rule in reference to the withdrawal of a case from the jury is that where all reasonable men would draw the same conclusion, then the case should be withdrawn from the jury, and if reasonable men would not draw the same conclusion, then the case is one for the jury. However, the application of the rule is conditioned upon the taking of the *proper view* of the evidence, and not merely that reasonable men may draw a different conclusion from the evi-

dence, the conclusion to be drawn is not an unrestrained one, but it must be a *proper conclusion* under the evidence. The fact that the jury reached a conclusion in favor of plaintiff and that the trial court denied the motion for a new trial is not material under the law applicable to and governing the application of the rule. The rule was considered and determined in the case of

American Car & Foundry Co. vs. Duke (C. C. A., 3d Ct.), 218 Fed. 437.

There was a verdict and judgment for plaintiff, motion for new trial denied, upon writ of error reversed upon the application of the rule above stated. At the conclusion of the evidence defendant requested a directed verdict, which was refused; from the opinion (p. 438), we quote:

“(1) The facts relied upon for the deduction of the defendant’s negligence, as first stated, are in the main undisputed, and with respect to them the question before this Court on review is whether they constitute acts from which *all reasonable men* might draw the same conclusion, and therefore, whether the court below *erred in declining* to treat the question of negligence as a question of law and in refusing to withdraw the case from the jury.” \* \* \*

The question was whether the negligence was one of fact or of law; the lower court submitted the case to the jury, which found for plaintiff, thus convicting defendant of negligence; motion for new trial was denied.



The appellate court held

“that the court below committed error in refusing to find, as a matter of law, that Duke was chargeable with the negligence that caused his injury, and in failing to bind the jury to return a verdict for the defendant.” (P. 442.)

The jury and the trial court did not draw the same conclusion from the evidence as did the appellate court; in discussing this question at p. 442 the appellate court said:

“In reaching a conclusion in this case we recognize the correctness and propriety of the rule of law that a case should not be withdrawn from a jury where upon a given state of facts reasonable men might differ as to whether there was negligence or not. In such a case, negligence is a question of fact and being such is to be determined by the jury and not by the court; but where the facts are such that from them all reasonable men would draw the same conclusion, and that upon the testimony no recovery can be had upon any view which can be *properly* taken of it, then the question of negligence ceases to be one of fact for the jury, and becomes one of law for the court to determine. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Sealey v. Southern Ry. Co., 151 Fed. 739, 81 C. C. A. 282; Bush v. Hunt, 209 Fed. 164, 126 C. C. A. 112; Myers v. P. C. Co., 233 U. S. 184, 193, 34 Sup. Ct. 559, 58 L. Ed. 906.

“In our opinion the conduct of Duke, in view of what he did, saw, and admitted to have known, amounts to misconduct, about which *reasonable men* cannot draw different conclusions, and we are of opinion that the court below committed error in refusing to find, as a matter of law, that Duke was chargeable with the negligence that caused his injury, and in failing to bind the jury to return a verdict for the defendant.

“The judgment below is reversed, and a new venire is awarded.”

We urge in the case at bar reasonable men could not upon any view which can be *properly* taken of the evidence in this case reach any other than the same conclusion, to wit, that Neasham destroyed himself; that jurors, influenced by anything other than the evidence, should not be permitted to reach a different conclusion and have that conclusion stand as a verity in the case. The Court in the case of *Agen v. Metropolitan Life Ins. Co.* (Wis.), 80 N. W. 1020, 1023, says,

“The jury could not have said *as men*, that the circumstances did not show suicide so as to leave no reasonable probability to the contrary; therefore it was not permissible for them to say it *as jurors* and have that stand as a verity in the case. The Court should have granted the motion to direct the verdict, and, failing in that, should have set the verdict aside and granted a new trial.”

The judgment was reversed.

In the case last cited the Court quotes from a previous decision as follows:

“There is but one reasonable inference that can be drawn from the evidence; that to attempt to draw any other would amount to a *pitiable stultification of the reasoning powers.*”

In discussing judgment and its incidents, the learned author in Cooley’s Blackstone, 3d ed., Vol. 2, p. 398, says:

“Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.”

There is no material and substantial evidence, if indeed there is any evidence, showing, or tending to show, that deceased was not guilty of self-destruction. It appears clearly and conclusively from the pleadings, opening statement by plaintiff’s attorney and the evidence that the deceased died from a gunshot wound of head and brain through the soft palate of the mouth and the base of the brain, without injury to lips, teeth or tongue, and that death was instantaneous; that the entrance of the gunshot wound

was so located way back in deceased's mouth so that it could not be reached or seen without depressing the tongue; that the clothing worn by deceased, when found, was in perfect order; that there were no fresh cuts, contusions or abrasions of the skin upon the body other than the wound in the mouth and at the back part of the head; that there were no tracks leading to the place where the body lay, except one line of tracks, which, of course, were made by Neasham himself as he walked to the spot; there were no tracks leading from the spot where the body lay; that Burke, the experienced officer, witness for the plaintiff, searched the place and roundabout for, but did not testify as to the finding of, any evidence of other persons having been there or of a struggle having taken place; that other witnesses gave testimony establishing that no other persons had been to the body and that no struggle had taken place; deceased was a big and powerful man, armed with a loaded 32-caliber Savage automatic pistol, all of which lead to but one logical, reasonable conclusion, to wit, self-destruction.

Considering the errors specified, and in their order herein stated, we submit the following:

Specifications and Assignments of Error Nos. I, II and III, Tr. 52-56, may be considered together; same being respectively concerning demurrer to the complaint, motion at close of plaintiff's evidence for nonsuit and for a directed verdict and the ruling of the Court as to the burden of proof under the pleadings, opening statement of plaintiff's attorney and



plaintiff's proof in chief, as hereinabove particularly specified.

Plaintiff in her complaint made the policy or contract, the foundation of the action, a part thereof, thereby making the "self-destruction" clause in the contract a part of the complaint, but the only allegation in the complaint in reference thereto was that the insured died—"how," it was not stated. To the complaint defendant demurred because it was ambiguous and uncertain in that it does not appear whether the insured was or was not guilty of self-destruction; that the complaint does not state facts sufficient to constitute a cause of action; the demurrer was overruled and defendant in its answer alleged "how" insured came to his death, to wit, that he "destroyed himself, and then and there died as the result of a self-inflicted gunshot wound." This issue was met by denial on behalf of plaintiff, and plaintiff asserted her version as to "how" insured came to his death by alleging in her reply "that her husband, William C. Neasham, the insured named in said contract \* \* \* came to his death \* \* \* from a gunshot wound inflicted upon him at the hands of some person or persons unknown to the plaintiff."

We have, therefore, by the pleadings, the admitted fact that death came by reason of a gunshot wound—defendant maintaining that it was self-inflicted, while plaintiff maintained that it was inflicted by some person other than the insured; in other words, defendant contended self-destruction, plaintiff contended murder. Under the contract sued upon, cer-

tain conditions precedent enter and determine the extent of the liability of the defendant upon death of the insured; before there was any liability for any amount whatever under the contract, death of the insured must exist or happen; the extent of the liability upon the happening or existence of death was dependent or conditioned upon the existence or happening of other conditions; if insured died from pneumonia, typhoid or any other fever, the means of death, the existence or happening of the thing which caused death, would determine the liability, nothing else appearing, as the face of the policy, while if self-destruction exists or happens, then the liability of defendant, nothing else appearing, would be a sum equal to the premiums paid thereon and no more. The *cause* of death, under the contract, determined the amount the beneficiary was entitled to receive; no estate or right of action to any extent vested in beneficiary until the happening of the death and the *extent* of the estate or right of action which vested upon the death was determined, by the terms of the contract, according to the *cause* of the death.

“If the thing conditioned is to exist or happen before the estate is to vest, the condition is precedent; if after, it is subsequent.”

12 C. J. 409.

The means or cause of death, self-destruction or other causes, being a condition precedent, under the contract, to the determination of the extent of the estate of the beneficiary, plaintiff was required to allege and prove the conditions precedent, cause or

means of death other than self-destruction, which, if true, would entitle her to a judgment for the face of the policy.

Failing to so allege in the complaint, plaintiff did in paragraph V of her reply allege:

“V. For a further reply \* \* \* plaintiff alleges that \* \* \* the insured named in said contract \* \* \* came to his death \* \* \* from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff.” (Tr. 15-16.)

Thereby, whatever may be the effect of failure to plead the matter in the complaint, casting the burden upon plaintiff to establish the alleged cause or means of death, murder, before plaintiff was entitled to a judgment upon the alleged cause of action for \$10,000. Plaintiff offered no proof whatever to establish the allegation and the issue thus joined (Tr. 72-84). Defendant at the close of all the evidence offered by plaintiff moved for a nonsuit and directed verdict (Tr. 84-87). The motion was denied upon the theory adopted by the trial court that plaintiff had made a *prima facie* case, and that the burden of proof was upon defendant, as more clearly appears in Assignment of Error III (Tr. 55, 56).

It is and must be the law that the burden of proof was upon the plaintiff to prove that the death resulted from a cause which, under the contract, entitled the beneficiary to recover the amount sought, as the specified amount due upon the happening of certain conditions.

The plaintiff had no absolute cause of action for \$10,000 under the policy made a part of the complaint upon the death of the insured; because the contract itself, by the terms of the self-destruction clause, shows that Neasham was not insured for \$10,000, if during the first insurance year he committed self-destruction; the insured died from a gunshot wound through the roof of his mouth into the brain during the first insurance year; seeking to recover by her action the \$10,000 which became and only became the amount of the insurance in the event of death from causes other than self-destruction during the first insurance year, the cause of death was a condition precedent, required to be pleaded and established.

The provision concerning self-destruction in the policy is not a provision cutting down the amount of insurance, but is a clause providing for the payment of a specific amount on the happening of the contingency therein named.

Scales v. National Life & Accident Ins. Co.  
(Mo.), 186 S. W. 948.

Paragraph 4 of the syllabus reads:

“A provision in an accident policy, providing for payment of only one-fifth of the face of the policy for death by being poisoned, does not cut down the amount of insurance, but is a mere clause for payment of a stipulated sum on the happening of a certain event.”

Fondi v. Boston Mutual Life Ins. Co. (Mass.),  
112 N. E. 622.



The jury was instructed:

“The burden of proof in this case to show that this policy has been avoided by breach of the condition referred to, rests upon the defendant. That is, unless he satisfies you by a fair preponderance of the evidence that the conditions of the policy are broken, then you should bring in a verdict for the plaintiff.”

The Supreme Court upon exceptions held that the instruction was error; that the condition therein referred to was a condition precedent and that the burden was upon the plaintiff; citing authorities.

Fidelity & Casualty Co. v. Weis (Ill.), 55 N. E. 540.

That the burden of proof upon the whole case was upon the plaintiff under the pleadings and opening statement of plaintiff's attorney, we cite:

Weil v. Globe Indemnity Co., 166 N. Y. Supp. 225.

American Accident Co. of Louisville v. Carson (Ky.), 36 S. W. 169, dealing with necessary allegations on part of plaintiff.

Specification and Assignments of Error IV and V, Tr. 56, 57, to the effect that the Court erred in sustaining objections to questions propounded to Doctors Gibson and Morrison, witnesses for defendant as appears Tr. 199, 200, 202, 209, 210, 211.

The questions, to which objections were sustained, propounded to Dr. Gibson, are:

“(Q.) Can you state the difference between a gunshot wound, or a pistol-shot wound, made

by the pistol being fired close to the object that it strikes, and when it is some distance from the object?" \* \* \*

"(Q.) If a pistol-shot was fired with the pistol close to the anatomy of a human person, right up close to it, would there be any difference between the character of the wound thus made and the character of a wound received by a bullet from the same pistol, fired at some distance from that object?" \* \* \*

"(Q.) Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by some one else?" \* \* \*

And the questions, to which objections were sustained, propounded to Dr. Morrison, are:

"Q. Assuming that testimony to be true, state whether or not, in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?" \* \* \*

"Q. Assuming the testimony of Doctor Gibson as true, particularly referring to the location of the wound, and the fact that the tongue, teeth and lips were not injured, would it, in your opinion, be possible to have inflicted that wound by a bullet fired from a thirty-two automatic pistol, with the pistol outside the mouth of the deceased?" \* \* \*

"Q. Assuming the testimony of Doctor Gibson as true, I will ask this question, your Honor,

to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?”

In support of the competency of such questions, and that the Court erred in sustaining objections thereto, we cite:

Thomas v. State (Tex.), 74 S. W. 36.

In a prosecution for murder, the witness testified that the wound in deceased's breast was a round hole, about the size of a guinea egg; that from an examination of the wound the gun used by the defendant was, in his opinion, fired within a few feet of deceased. Held, competent for witness to so testify without qualifying as an expert.

Miller v. State (Okl.), 132 Pac. 717, L. R. A. 1915A, 1088.

The following question, “What is your opinion as to whether the wound was inflicted by Jane Schneck herself or by another?” was held to be proper.

Streight v. State (Tex.), 138 S. W. 742.

State v. Asbell (Kans.), 46 Pac. 770.

It was held that a medical expert, qualified by study and experience, who examined the body of the deceased shortly after the wound was received, may give his opinion as to whether it was produced by a near shot or one fired from a distance.

“On any subject not within the common knowledge and experience of men of common education in the ordinary walks of life, an expert witness may be asked the cause of a casualty,  
\* \* \* even though it be the precise question upon which the jury are to pass.”

Abbott's Trial Brief, Mode of Proving Facts,  
2d ed., 223.

The above having particular application to the fact that the wound was located in an unusual place, through the soft palate of insured's mouth, without injury to the hard palate, lips, teeth or tongue of deceased, resulting in a large, ragged crater-like opening as shown by the undisputed testimony of several witnesses.

Specification and Assignment of Error VI, Tr. 58, *in re* admission, over objection, of testimony of Burke, witness for plaintiff as to what he saw upon the ground February 28th, the day after the insured destroyed himself, as claimed by defendant, or was murdered, as claimed by plaintiff.

The admission of the testimony of witness Burke, as to what he discovered upon the ground February 28th, over defendant's objection, was prejudicial error. This clearly appears from the record.

The importance of this error is shown by the fact that the jury, after deliberating <sup>2802</sup> over two hours, returned into court and asked "to have ex-Sheriff Burke's evidence read as to the tracks he testified to having found on the railroad" (Tr. 301). Thereupon the reporter read to the jury what purported to be said testimony of witness Burke, as appears Tr. 303. We have set out above in the specification of this error such testimony and commented thereon, to which testimony and comment reference is made without repeating here.

In addition it appears from the record that not only the jury gave particular and important consid-



eration to the testimony of witness Burke, but it appears that the trial court, in denying the motion for new trial, relies largely upon such testimony so given by Mr. Burke (Tr. 24, 25). In fact, it appears from the opinion of the trial court (Tr. 18-42) that the motion for new trial was denied largely upon such testimony of Mr. Burke, and the purported testimony of Sheriff Ferrel before the coroner's inquest, which said testimony was admitted over objection and exception of defendant next herein referred to.

Specification and Assignment of Error VII, Tr. 58, 59, concerning error of the Court in permitting plaintiff, over defendant's objection, to offer in evidence what purported to be testimony of Sheriff Ferrel before the coroner. The testimony and the record page thereof, Tr. 251, 252, is set out and referred to above in the specification of this error.

The importance of this error is emphasized, as in the case of the admission of the testimony of witness Burke, from the fact that the jury, after having deliberated <sup>about</sup> ~~over~~ two hours, returned into court (Tr. 301), and asked "to have read the transcript of Sheriff Ferrell's evidence before the coroner's jury." The record was so read (Tr. 301, 302), as we have hereinabove set forth.

That the reading of such record was prejudicial to defendant, both before the jury and the trial court, is evident from the record; the trial Court, in its opinion denying the motion for new trial, lays great stress upon the so-called record; upon such record the trial Court, in its opinion (Tr. 25), says,

there was a discrepancy in the evidence as to the condition of the pistol found by the body of the deceased and the number of unexploded shells it then contained. The only evidence that could be considered as the basis for the statement that there was a discrepancy would be the purported record testimony of Sheriff Ferrell before the coroner, referred to and discussed by the trial court (Tr. 26); without the purported testimony of Sheriff Ferrell, before the coroner, in the record there would be no discrepancy of any nature or kind in the evidence—the admission of such document in evidence we urge was great and prejudicial error.

There is no statute providing that such testimony taken before the coroner shall be evidence in any proceeding of any nature or kind whatsoever. The paper produced, “In the Matter of the Inquisition upon the Body of William C. Neasham, Deceased,” was not signed by witness Ferrel; the witness Ferrel stated emphatically and positively that he did not give such testimony; this testimony was put in for the purpose of impeaching the testimony of said witness Ferrel; therefore, in order to show what Ferrel’s testimony was before the coroner, it was necessary to produce his testimony there in a way which could not be impeached. The document produced and read from for that purpose is not authorized by any statute to be evidence in any proceeding.

The statute of Nevada covering this matter is sec. 7550, Revised Laws, and reads as follows:

“The testimony at such an inquest shall be reduced to writing by the justice of the peace, act-

ing as coroner, or as he may direct, and by him, without delay, filed in the office of the clerk of the District Court of the county.”

We submit that witness Ferrel should not be bound by someone else’s statement of what such other person claimed his testimony was without Ferrel having ever seen what this statement was, without his ever having assented to it, and without the party claiming to furnish such testimony submitting himself for examination. No one testified that the statement contained in the document offered was the testimony of witness Ferrel. As the record now stands, the document purporting to be the testimony of witness Ferrel before the coroner is the merest hearsay, not binding on the witness or anyone else, yet it was admitted over defendant’s objection.

We submit that the admission of said purported testimony was clear prejudicial error.

In support of our contention, we cite the following authorities:

State v. Hayden, 45 Iowa, 11, 14, 15.

Paragraph 2 of the syllabus reads:

“EVIDENCE: IMPEACHMENT. The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness.”

From the opinion (pp. 14, 15), we quote:

“But the minutes of a witness’ testimony before a grand jury, and the substance of his testimony taken before an examining magistrate, are in no proper sense the writing or the act of the

witness. It is the duty of the clerk of the grand jury to take and preserve the minutes of the proceedings, and of the evidence given before it. Code, sec. 4275. *The witness is in no way connected with the act of taking these minutes of his testimony, they are not required to be read over to him, nor to be signed by him.* Unlike a deposition or affidavit, they do not purport to give statements of fact in full, but are what the law requires, mere ‘minutes.’ They are often taken down by persons wholly inexperienced in reducing the language of others to writing. A long experience upon the District Bench has enabled the writer hereof to observe that the evidence taken before grand juries is often of the most indefinite and uncertain character, *and if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses, and tend to defeat a proper administration of justice.*

“What we have said in regard to the evidence taken before the grand jury *applies with equal force to the evidence taken in a preliminary examination.* Section 4241 of the Code requiring the magistrate to write or cause to be written out the substance of the testimony only. It is not required to be read over to the witness, and is but the act of the magistrate or his clerk.

“Excluding the written minutes or substance of the evidence from being introduced does not prevent an impeachment. The grand jury may be required by the court to disclose the testi-



mony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given before the court. Code, sec. 4285. An examining magistrate, or his clerk, or any person who heard the testimony, *may be called for the same purpose*. It appears that in this case the evidence taken before the grand jury was signed by the witness who was sought to be impeached. It does not, however, appear that the evidence was read over to him, or that he was otherwise made acquainted with its contents at the time of signature."

Redford v. Spokane St. Ry. Co. (Wash.), 46 Pac. 650.

Paragraph 3 of the syllabus reads:

"3. One cannot be impeached by a transcript of the stenographer's notes of his testimony on a former trial, but the stenographer, or some one else who heard the testimony, should be called."

From the opinion (p. 652), we quote the following:

"For the purpose of contradicting the respondent, the appellant offered in evidence what purported to be a certified copy of the transcript containing respondent's testimony given upon the former trial. It was excluded upon respondent's objection, and this ruling is assigned as error. The proper method of impeachment would have been to produce the stenographer or some one else who had heard the testimony given by the respondent on the former trial; *but a*

*transcript of the stenographer's notes was not competent evidence, and the objection was properly sustained. 1 Thomp. Trials, sec. 504; Phares v. Barber, 61 Ill. 271; State v. Hayden, 45 Iowa, 11; State v. Adams, 78 Iowa, 202, 43 N. W. 194."*

State v. Adams (Iowa), 43 N. W. 194.

Paragraph 4 of the syllabus reads:

"After defendant's counsel had called the attention of witnesses for the state to the minutes of their evidence taken by a shorthand reporter at the preliminary examination, and to certain discrepancies between them and their testimony on the trial, he offered to read the minutes to the jury, for the purpose of impeaching the witnesses. Held, properly refused; defendant having full opportunity to call the shorthand reporter, and to use his minutes to show what they contained."

From the opinion (p. 195), we quote:

"The defendant was arrested soon after the death of Daring. A preliminary examination was had before a justice of the peace. A shorthand reporter was appointed by the justice to take down the minutes of the testimony. Upon the trial, the defendant's counsel called the attention of a number of the witnesses for the state to the minutes of their evidence, and to certain discrepancies between them and their testimony on the trial. Afterwards counsel offered to read the minutes to the jury, for the purpose of impeaching the witnesses. The

state objected, and the objection was sustained. Counsel claim that this ruling was erroneous. We think otherwise. This Court has expressly determined that question. See *State v. Hayden*, 45 Iowa, 11. The Court gave to the defendant the fullest opportunity to call the shorthand reporter, and allow him to use his minutes as memoranda, and thus show what they contained. We think the defendant has no reason to complain of this ruling."

*Phares v. Barber*, 61 Ill. 271, 276.

From the opinion we quote:

"We do not think it error to refuse introduction of the testimony of appellee for the purpose of contradiction as transcribed from a phonographic report of a former trial between these parties. So far as the record shows appellee had never seen this transcript of his evidence, and did not even know of its existence. *It may have been a fair and truthful report of his testimony, and it may not.*

"These reports are taken for the convenience of the parties. The legislature has not declared that they shall be evidence upon the trial, *or for any purpose and we have no power to legislate.*"

*Nash v. State* (Ark.), 84 S. W. 497.

Paragraph 7 of the syllabus reads:

"On a criminal prosecution it was error to permit a witness to be impeached by reading a part of what purported to be his testimony before the grand jury, it not being proved that

he had read, or heard such testimony read, or that he had so testified.”

From the opinion (p. 499), we quote:

“*The Court erred* in permitting Quilling to be impeached as a witness by the reading of a part of what purported to be his testimony before the grand jury. It was not proved that he had read or heard such testimony read, or that he had so testified. Quilling was an important witness for the defendant, and his impeachment may have been prejudicial.”

It is true that the document read from to impeach Sheriff Ferrel purports to be a copy of a public document, and we understand that it was permitted to be used as impeaching evidence for that reason. The only effect given by the statute to a properly certified copy of a public record “is that it may be read in evidence in any action or proceeding in the courts of this state in like manner and to the like effect as the original could be if produced.” Sec. 5409 Rev. Laws, Vol. 2. The statute also provides that the record of testimony of any witness stenographically reported *by an official court reporter* may be *only used* when the witness is dead or beyond the jurisdiction of the court. Sec. 5472, Rev. Laws. The objection made to the use of this purported testimony as impeaching evidence, is in no wise cured by the fact that it became a public record. That objection *goes to the competency of the original* and if the original is incompetent, of course the fact that it had become a public record, or was properly certified as such, does not make the copy competent evi-



dence, if the original is not. Further, there is no testimony that the record introduced in evidence was stenographically reported by an official court reporter, and it appeared that the witness was not dead or beyond the jurisdiction of the court. These two matters being referred to in sec. 5409, Rev. Laws of Nevada, above mentioned.

Specifications and Assignments of Error VIII, IX and X, Tr. 59-62, XII, XIII and XIV, Tr. 66-68, in reference to the motion for a directed verdict at the conclusion of all the evidence, and to defendant's requested instruction No. 1 and to defendant's requested instruction No. 2, and that the verdict is not sustained by the evidence, hereinabove specified, may be considered together.

We have under statement of the case herein set forth, considered <sup>generally</sup> jointly and more or less specifically the pleadings and contentions of the respective parties, and the evidence in this case, to which reference is hereby made without repetition thereof.

In making the motion for a directed verdict, and in presenting the matter now upon writ of error, the distinction between the function of the trial court in directing a verdict and in granting motion for new trial is recognized. That distinction is considered by this Court in the case of

Smith-Booth-Usher Co. v. Detroit Copper Mining Co., 220 Fed. 600.

In the opinion the Court, after citing and quoting from three cases, at p. 603, says:

"The following decisions, and many others that might be cited, have definitely and dis-

tinctly established the rule that if there is any *substantial* evidence dealing upon the issue, to which the jury might *properly* give credit, the Court is not authorized to instruct the jury to find a verdict in opposition thereto."

Tested by these rules, we submit that on a careful consideration of the evidence in this case, the verdict should have been directed for defendant.

In *Mt. Adams E. P. Inclined Ry. Co. v. Lowry*, 74 Fed. 463, being one of the opinions cited by this Court in the *Smith-Booth-Usher Company* case, *supra*, Judge Lurton, at p. 465, said:

"The question, when a motion to direct a verdict is made, is this: Is there any *material and substantial evidence*, which, if credited by the jury, would in law justify a verdict in favor of the other party?"

We urge, in the case at bar, there is no material and substantial evidence which would in law justify a verdict in favor of plaintiff, and, therefore, the verdict should have been directed for defendant.

That the insured came to his death from a gunshot wound, and within the first insurance year, is alleged and admitted by the pleadings; also it is established by plaintiff's proof in chief, particularly the proofs of death, Physician's Statement No. 2 (Tr. 310, 311), where it is stated that the immediate cause of death was "gunshot wound of head and brain. Death was instantaneous." We have above considered the insufficiency of the allegations of plaintiff's complaint, tested by the demurrer filed. Also we have pointed out the allegations in defendant's answer and plain-

tiff's reply thereto, making the issue as to how, by what means, the gunshot wound causing the death of insured was inflicted, defendant's contention being that it was self-inflicted, thereby constituting self-destruction under the contract sued upon; plaintiff's contention by her pleadings and by the opening statement of her attorney (Tr. 75), that the gunshot wound which was the cause of insured's death, was inflicted by persons other than the insured, thereby constituting murder. It is true that there is a presumption of law against self-destruction; it is likewise and also true that there is a presumption of law against murder; the presumption, therefore, of law in the case does not aid either party concerning the issue thus made by the pleadings. And as we have pointed out above, citing authorities to that effect, the burden of proof was upon the plaintiff to establish the means or cause of death alleged by her, to wit, murder, and upon this issue we submit that the record is barren of any evidence, much more so is it barren of any *material and substantial* evidence, justifying the Court in sending the case to the jury or justifying the verdict in favor of plaintiff.

Briefly, the record shows, that the insured was not seen at his home from Friday evening about six o'clock until some time next morning, when the members of the family got up. Evidently insured did not spend Friday night at home; if he had been there undoubtedly he would have been seen, but no one of the family testifying, to wit, Mrs. Neasham, the wife and plaintiff (Tr. 148), the son Edward (Tr. 124, 125), the ward, Ray Cool (Tr. 225), saw

the insured between Friday evening about six o'clock and next Saturday morning when they got up; the son admitted that he testified at the coroner's inquest that his father did not come home Friday night (Tr. 125). Singular, isn't it, that this family man, this home man, would leave his home at six o'clock Friday evening and not show up until some time next morning without some producing cause. Did he explain to his wife where he had been the night before? Of course not, or plaintiff's attorney would have produced in evidence such explanation. Where was the insured, and what was he doing between the time when he left home Friday evening at six o'clock and the next morning when he returned to his home? About six o'clock Friday evening, evidently immediately after he left his home, we find the insured purchasing and being shown how to operate a Savage automatic 32-pistol, and when informed that there were not enough shells to fill it, saying "there would be plenty" (Tr. 111-113). Where the insured spent Friday night the record does not disclose; it is singular he did not tell his wife if his absence was not because of something unusual; indeed, if the absence had been caused by something unusual which was not a matter that he wished to conceal from his wife, much more would he have explained, and if he did tell, it is indeed singular that the wife did not testify concerning same. In this same connection we direct attention to the record (Tr. 242-243), testimony of the daughter concerning her testimony before the coroner's inquest, which she says



she did not remember, concerning business worries of deceased.

Insured left his home Saturday morning about 8:30 o'clock and alone walked down the railroad track from Reno towards Sparks, where he was found in the gravel or oil pit or cut alongside the railroad track unconscious, all but dead, with a gunshot wound through the soft palate of his mouth, ranging a little upward, and a star-shaped fracture of the back part of the skull where the bone was pushed out; the Savage automatic pistol which he had purchased the evening before lying within from three to eight inches from his right hand, the handle of the pistol next to his right hand, and the barrel partially filled with the soft sand or dirt of the slope of the bank of the cut; an empty shell, 32-caliber, close by the 32-automatic pistol, the hammer of the pistol back, and a loaded shell in the chamber, the pistol ready to shoot by simply pulling the trigger; blood oozing from the mouth and nose of insured, pulse still beating; clothes in perfect order, including necktie and collar, and even his hat was within about ten inches of his head, where it had evidently fallen as the body fell from a sitting posture upon the shot being fired into the mouth of the insured; not only was the clothing in perfect order, but there was found upon the body "money to the value of two dollars and a half; one Parker fountain-pen, one pocket comb and case; one gold watch, which had a label of R. Herz thereon; a chain and charm; one pocket-knife; one purse; \* \* \* books, papers, letters, one lead pencil, and stick-pin" (Tr. 99, 100).

With all these separate articles being found intact upon the person of the deceased and the clothing being in perfect order, as shown by the testimony, can any reasonable person say that deceased had engaged in any struggle of any kind, much less in a "close, deadly struggle with an assailant," remembering that deceased was a powerful man, about forty-eight years of age, six feet tall, and weighing 200 pounds, and the body being found with the clothing in perfect order and with all the articles above mentioned in his pockets? Certainly, in any struggle of any nature, more particularly a struggle for the preservation of life, the clothing, articles and body of deceased would not have been left in such perfect order. Further, the ground surrounding the vicinity where the body was found was examined by officers of the law and others seeking to discover any evidence of foul play, yet nothing of that character was discovered. The coroner (Tr. 99), testified: "I saw no other tracks or footprints in the immediate vicinity where the body lay; the only foot-tracks were the foot-tracks of one person, that led to where the body lay. \* \* \* The ground showed the tracks distinctly and clearly" (Tr. 100). Burke, an experienced police officer, witness for plaintiff testified: "I examined the ground about the place for tracks, or for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there" (Tr. 233, 234), but he gave no testimony of having found any indication "of any struggle having taken place there."

Sheriff Ferrel, having served as sheriff of Washoe County "something over nine years," investigated the surroundings when he arrived upon the scene and testified (Tr. 158):

"Arriving at the scene, I found three tracks leading down to where the body was lying; one track leading to the spot, two other tracks leading to within about eight or ten feet of the spot. Those tracks turned and went back, making altogether five lines of tracks, three going and two returning. \* \* \*

"I examined the north bank of the cut to see if any human tracks had come down there; seeing none, I examined the south bank, and found none there; I examined for a number of feet around the body, *possibly fifteen or twenty feet*; I saw no other tracks other than what I mentioned."

Evidently the tracks other than "the only foot-tracks were the foot-tracks of one person, that led to where the body lay," as testified by the coroner (Tr. 99), which were discovered by the keen, observing sheriff, as above set forth, were not fresh tracks and were not tracks as described by the coroner when he said, "The ground showed the tracks distinctly and clearly" (Tr. 100), but were evidently old tracks in a measure indistinct and faint.

That these lines of tracks referred to by the sheriff were not made by Lalonde, Brown or Rudolph, or either of them, being the persons who first discovered the body, and that neither of said parties went down into the oil or gravel pit at all until after the sheriff's

party had arrived, is clearly shown by the record.

Testifying as to what happened before the sheriff arrived, Brown, replying to the question, "Did the three of you, or any of you, go down to the pit?" said: "No, we didn't go down to the pit. We just went to the bank and looked over, and this young man was with me. He walked down to the edge of the bank and said he thought he seen a revolver there" (Tr. 119).

Lalonde, who discovered the body (Tr. 114, 115), testified:

"A. I came from Sparks Saturday morning, and I came along the track, and I noticed a man laying there; he was below the railroad track, and when I got closer to him I heard him snoring very heavily, so I stopped to look. I thought there was something wrong with the man who laid there very still, so I stood around a few minutes, and two men came up, and I called their attention to it; they ran over, and we stood and looked down. I stepped around a little and I saw the gun. So I mentioned that we would have to give word to somebody, and there was two of us went down within six feet of him, and looked at him six feet distant, so then we went right away to Coney Island, and went in a private house over there, and telephoned. We waited awhile, and then we walked over to where the man was laying, and we still waited for the sheriff to come, and the man was dead then."



The pit at the bottom of which the body lay was about fourteen feet deep (Tr. 151). The body, about six feet in length, reclining up the bank of the cut so that the head of the body must have been at least eight feet below the top of the cut (photograph, Tr. 317); meeting the top of the cut or pit, the ground sloped from there to the railroad track where the men stood (photographs, Tr. 314, 316, 317 and 318).

Lalonde testified *supra*, "and there was two of us went down within six feet of him" (Tr. 115, 116).

Rudolph, of whom Brown spoke as the "young man" (Tr. 118, 119), testified that he went down to within about eight feet of the body, stating, "the other gentlemen stayed up, and I went down seven or eight feet. I could see he had shot himself, and I went over and telephoned to the police (Tr. 121).

The men standing at the top of the bank of the cut or pit would be within from six to eight feet from the body; thus Brown's statement that none of them went into the pit, but that they just went to the bank and looked over, squares with the rest of the testimony. When the sheriff arrived, none of the men were in the pit. The undertaker who was with the sheriff, testified:

"As I remember, there was one man met us at the gate from the main road leading into this lane, and directed us the way to go to where Mr. Neasham's body was; and the other two men, as I remember, were on the railroad, standing on the railroad track above where Mr. Neasham was lying in the pit below" (Tr. 177).

Not having been in the pit until they went there with the sheriff and coroner, neither Lalonde, Rudolph or Brown could have made the tracks observed by the sheriff that approached to a point six or eight feet from the body and then turned and went back (Tr. 158). The testimony is uncontradicted; it permits of no other inference.

It is cause for wonder that there were no other inquiries made of these parties at the coroner's inquest regarding their identity. At the trial of this case, the coroner was willing to state why he did not make any further inquiry, and the Court saw no objection to his doing so, but plaintiff's attorney did (Tr. 120). It is significant that he did; he was at the coroner's inquest (Tr. 117), and asked questions there (Tr. 115), and his wife is the sister of plaintiff (Tr. 279); he was more personally interested than anyone else at the inquest in exposing anything that might indicate that Neasham had been murdered—the contention of plaintiff in the case at bar; yet he made no further inquiries regarding the identity of these three men. Why? The answer is not far to seek—he knew, just as did the coroner, the sheriff, the district attorney, that there was not the slightest reason to believe that any of these men had anything to do with Neasham's death; and, knowing this, he objected to the coroner's elaborating the truth in the presence of the jury.

The location of the gunshot wound, entering the soft palate of the mouth, penetrating the base of the brain, pushing out the skull in the back of the head at a point a little above the point of entrance, with-

out hitting or injuring the hard palate of the mouth or the tongue, or teeth or lips, the point of entrance being where it was impossible to see the wound without depressing the tongue, and after the body was cold it being impossible to depress the tongue so as to see the injury or wound, the wound being a large, crater-like, ragged opening caused by concussion, the explosion of the shell—demonstrates to the exclusion of any other reasonable or intelligent inference that the muzzle of the pistol was in the mouth of Neasham at the time the shot was fired.

The condition of the bank of the gravel-pit or cut at and above where the body was found, the condition of the clothing, the position in which Neasham's hat was found, about ten inches from and to the right of his head, in the direction it would naturally fall from his head when he fell over after he shot himself, the location of the pistol which he had purchased the evening before, the unobstructed view along the railroad tracks (photographs, Tr. 315, 316, 317 and 318), demonstrates to the exclusion of any other reasonable or intelligent inference that Neasham was not attacked while upon the railroad track, and then thrown or pushed over or down the embankment into the pit.

The scar, dent, or depression on deceased's forehead near the hair-line was the subject of testimony by witnesses offered by plaintiff, such witnesses being members and relatives of the family, the ward of deceased and the family physician, such testimony being to the effect that they had never, prior to his death, observed this mark on the forehead of de-

ceased. We have above referred to the testimony and the page of the record where found. Disinterested witnesses, those who were in no way connected with either party to the litigation nor interested therein, described the mark as a white line, an old scar which had healed; referring to the record and the testimony of Chick, the undertaker, this is described as a scar, a white streak, there was no black and blue place there, no cut, no abrasion of the skin, no blood there (Tr. 174); it was very slight, it was more like a white streak in the flesh where it had healed (Tr. 185); the scar was whitish in appearance (Tr. 185); it looked old, there was no blue or black place around the vicinity of the whitish looking scar (Tr. 186); that he bases his judgment that it was an old scar on that as upon previous scars that he had seen (Tr. 187).

Similar in effect was the testimony of Dr. Gibson. Dr. Ascher, the family physician, did not notice this scar at all until his attention was called to it, even then he didn't pay much attention to it—is it possible that it would have been treated in such a light manner if indeed it had been anything other than an old scar that had healed? Sheriff Burke, in examining the body at the undertaker's, did not observe any other than the wound in the mouth (Tr. 233).

Plaintiff, the widow of deceased, was upon the witness-stand three different times, yet she was asked nothing concerning this scar, dent or depression. It is a presumption in law that where a party is present at the trial and has information concerning facts



being inquired about and is not asked in reference thereto, that the testimony of such witness would be adverse to the fact sought to be established. Why was not the widow asked by her attorney concerning this white scar, when it occurred, when she first knew of its existence? The negative testimony of others, interested in the success of plaintiff in the case, concerning this scar, may be included in the word, recently brought into common use, "camouflage." It seems, however, to have served its purpose along with the charge of the Court to the jury where the jury was authorized to consider the question of accident, mischance, and "if in your examination of this evidence you conclude you cannot account for the death of this deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with some other theory which you believe the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment" (Tr. 298). The theory advanced by either counsel was as made by the pleadings and as made by plaintiff's attorney's opening statement, that it was a case of self-destruction or murder, but by the instruction given the jury they were at liberty to disregard and discard the issue joined and return a verdict upon some other theory. Upon what theory the verdict was returned, the record is silent.

In order to compel the jury to return a verdict within the issues made and not upon some other theory, defendant's counsel, at the close of all the evidence and before the argument and before the

charge to the jury, requested the Court to submit to the jury for determination two questions of fact, said questions of fact so requested reading:

“a. That the insured, William C. Neasham, came to his death from a gunshot wound self-inflicted.

“b. That the insured, William C. Neasham, came to his death from a gunshot wound inflicted by some person or persons other than himself.” (Tr. 47, 48.)

The Court refused to submit to the jury said questions of fact. Such refusal was assigned as one of the grounds for a new trial in defendant's motion for a new trial as appears Tr. 47, 48.

We appreciate that in a trial in the Federal Court a party has no legal right to demand special findings as is the law in some states; that such refusal is not a matter for which error may be assigned, and no error has been assigned because of such refusal.

Section 5222, Rev. Laws of Nevada, authorizes the submission to the jury of such questions of fact.

In *Moore v. Northwestern Mutual Life Ins. Co.* (Mass.), 78 N. E. 488, 489, the Court submitted to the jury the question, “Did the deceased, Walter T. Moore, die intentionally by his own act?” The jury answered, “Yes.”

No case has been cited, and we know of none, where the evidence was so clear, cogent and conclusive, where all the physical facts, the location of the gunshot wound causing the death of insured was in the mouth of deceased, as in this case, where the verdict for plaintiff has been permitted to stand. All

cases cited in the opinion of the Court denying the motion for a new trial are easily distinguished from the facts in the case at bar.

Hodnett v. Aetna Life Ins. Co., 87 S. E. 813. Judgment was for the defendant, on error affirmed. From the opinion we quote:

“The deceased was found, \* \* \* dying from a bullet wound. He was breathing, but unconscious, and was bleeding profusely from the mouth and nose, and also from the top of the head. He was lying stretched upon the floor and a pistol was found about five or six feet from his body. \* \* \* The only wound upon his body, except a slight powder burn on one of his hands, was through the roof of his mouth. The hole, the point of entrance, as testified to by all the experts examined, was inside the mouth, and was large enough to insert therein a man’s index finger, which the expert witnesses declared established that the wound must have been inflicted at very close range. There were no powder marks or wounds of any nature upon the lips or teeth. \* \* \* In our judgment, the evidence, and *especially as to the physical facts*, surrounding the death of the deceased, was sufficient to overcome the presumptions of law that the deceased did not kill himself, or that, if he did, it was not intentional, but accidental, and to demand a finding that he *came to his death by his own intentional act.*”

State Mutual Life Ins. Co. v. Long, 178 S. W. 778.

Moore v. Northwestern Mutual Life Ins. Co.  
(Mass.), 78 N. E. 488.

Agen v. Metropolitan Life Ins. Co., *supra*  
(Wis.), 80 N. W. 1020.

American C. & Foundry Co. v. Duke, *supra*  
(C. C. A., 3d Ct.), 218 Fed. 437.

Walters-Pierce Oil Co. v. Van Elderen (C. C. A.,  
8th Ct.), 137 Fed. 557, 569, the Court says:

“The now better recognized rule is that, where the evidence in support of a given situation or fact is overwhelmingly persuasive, it is not to be maintained that any evidence to the contrary, however inconsequential, and improbable, should carry the case to the jury for their determination.”

In the case last cited, a witness testified that he saw a man at a certain time at a certain place. Under the facts disclosed it was held that the testimony was not entitled to any consideration whatever.

Western Union Tel. Co. v. Baker (C. C. A.,  
8th Ct.), 140 Fed. 315, 319.

Missouri K. & T. Ry. Co. v. Collier (C. C. A.,  
8th Ct.), 157 Fed. 347, 353.

United States v. Sixty Barrels of Wine, 257 Fed. 846, where a chemical test of wine was held to overthrow positive testimony as to the kind of wine contained in the barrels.

Dagger v. Van Duck, 37 N. J. Eq. 130, 132.

Moore on Facts, Vol. 1, Sec. 149.



McLeod v. Miller & Lux (Nev.), 153 Pac. 566, 570.  
Paragraph 2 of the syllabus reading:

“Where the testimony of witnesses is refuted by physical law, or matters of common knowledge, no probative force can be allowed such testimony.”

Ziebell v. Fraternal Reserve Assn. (Wis.), 149 N. W. 475-476.

Modern Woodmen of America v. Kincheloe (Ind.), 94 N. E. 228. In the opinion the Court says:

“But if the record discloses *no fact* inconsistent with the conclusion of death by suicide, the verdict will fall for lack of the proper support.”

Elliott on Evidence, section 2293, *inter alia* says:

“In proof of suicide the location of the wound is important. Wounds or injuries inflicted for the purpose of self-destruction are usually upon the front or right side of the body.”

In the case at bar, the location of the wound, heretofore described, demonstrates to the exclusion of any other reasonable or intelligent inference, that the wound was self-inflicted and for the purpose of self-destruction.

Specification and Assignment of Error XI, Tr. 62-66, concerning instructions given the jury.

There was no suggestion in the pleadings, nor was there any evidence or suggestion of evidence, that Neasham's death was the result of an accident or mischance. The issue joined upon this question was—self-destruction, as provided in the contract, main-

tained by defendant, and that he was shot by some other person, maintained by plaintiff; furthermore, the location of the gunshot wound in the mouth was positive, affirmative evidence, demonstrating to the exclusion of any other reasonable or intelligent inference, that the shot was not by accident or mischance; is it reasonable to say that Neasham, while sitting on the sloping side of the cut, put the barrel of the loaded and cocked pistol way back into his mouth by accident or mischance, and while it was there that he pulled the trigger and shot himself by accident or mischance.

Is such a proposition to be seriously considered in our high courts? We can understand how, during the rush and excitement of a trial, the Court may and frequently does erroneously admit or exclude evidence, and also err in the giving of instructions—such we submit was done in this case—to cure both of which we are appealing to this Court in its calm and deliberate judgment.

There was nothing in the pleadings or in the evidence suggestive of accident or mischance—no man exercising ordinary common intelligence, or intelligence even of a lower degree, could infer from the evidence under the issues that Neasham *accidentally* or by *mischance* shot himself. It is apparent that the muzzle of the gun when fired was placed far back in his mouth. Is that the way a man handles a gun when he *accidentally* or by *mischance* shoots himself? Never!

The charge of the Court, therefore, in submitting to the jury the question of accidental death or death

by mischance was without the issues and without any evidence and was error, prejudicial to the defendant, to which exception was taken at the trial (Tr. 300).

As to accidental death or death by mischance, the Court, in its charge to the jury, said:

“The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to overcome the presumption of the innocence of the deceased of the wrong involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, *rather than accident, mischance*, or violent injury inflicted at the hands of another.” (Tr. 291.) “If one is handling a deadly weapon or other instrumentality, in a negligent and careless manner, and as a result *is accidentally killed*, in such an instance, although death results from his own act, *it is not self-destruction*, or suicide *such as to excuse a defendant’s liability*, for the intent is absent. In such case it is what is denominated as *accidental death*.” (Tr. 292.) “If, on the other hand, the jury find that the shooting was done by the deceased, but that it was done *accidentally*, or was the *result of carelessness*, and without the intent or purpose of taking his life, *then under the evidence, the plaintiff will be entitled to a verdict*.” (Tr. 293.)

In *Moore v. Northwestern Mutual Life Ins. Co.*, *supra* (Mass.), 78 N. E. 488, the Court discusses the effect of the old provision, in regard to suicide, in

policies and the construction placed thereon by the courts, and then says (489, 490):

“To meet the difficulty caused by this conflict of decisions, the words sane or insane were introduced into policies of insurance. \* \* \*

“On reason and, on the authorities, we can have no doubt that the old rule is done away with, and that the words ‘sane or insane’ cover every case of suicide. Of course, a death by shooting may be accidental, *but there is nothing in this case to show any accident.* The evidence shows clearly a case of suicide and it makes no difference what the state of mind of the person committing suicide was.”

United States v. Breitling, 20 How. 252, 254, 255, the Court says:

“It is *clearly error* in a Court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony.”

The charge of the Court—that plaintiff has made out her cause of action; that the burden of proof was upon the defendant; that the presumption of law was against “suicide or self-destruction,”—was error.



The burden of proof was upon the plaintiff upon the whole case, as made by the pleadings. By its charge, the Court ignored the issue "self-destruction" versus "murder," against both of which there is an equal presumption of law, without telling the jury of the presumption of law against murder, and sent the case to the jury under the instruction that the plaintiff had made a *prima facie* case and repeatedly stated that the burden of proof was upon the defendant—such charge could only have been, and no doubt was, understood by the jury as meaning that if, upon all the evidence, they were in doubt, or if the scales hung evenly balanced, the law presumed the issue in favor of the plaintiff.

Instructions similar to the ones given in the case at bar were considered in the case of *Weil v. Globe Indemnity Co.*, 166 N. Y. Supp. 225, from which opinion we quote:

"The plaintiff's case was duly established *prima facie*, supported by the well-established presumption that where the cause of death was either accident or suicide, and there *is no evidence explaining* the cause, the law presumes that the death was accidental. The defendant pleaded and undertook to establish as an affirmative defense that the deceased intentionally jumped in front of the train for the purpose of ending his life." \* \* \*

"This direct testimony, however, *cast upon the plaintiff* the burden of meeting defendant's affirmative case, for the rule is, and it is conceded, and was so charged by the trial court, *that the burden* of proof that the death was ac-

cidental is upon the plaintiff, *on the whole case.*”

\* \* \*

“The learned trial justice, however, nullified his charge that the burden of proof on the whole case was with the plaintiff by twice pointedly instructing the jury, in connection with the burden of proof, that:

“ ‘If the facts are equally susceptible of either construction—that is, suicide on the one hand; accident upon the other—it will be presumed that the death was the result of an accident and not of a wrongful intent.’

“This was tantamount to instructing the jury that, if the evidence was evenly balanced, the law resolved it in favor of the plaintiff. This squarely put upon the defendant the burden of producing a preponderance of evidence, and was directly contrary to the charge that the burden of proof on the whole case was on the plaintiff. As was said in *Whitlatch v. Fidelity & Casualty Co.*, 149 N. Y. 35, 43 N. E. 405, where the issue is so close it is extremely important to have the rules as to the burden of proof correctly given to the jury. These contrary instructions were confusing to say the least, *and could only have been understood by the jury* as meaning that if, upon all the evidence, they were in doubt, or if the scales hung evenly balanced, *the law presumed the issue in favor of the plaintiff.* The Court would have been entirely correct in telling the jury that the presumption of law is against suicide, and that in weighing the evidence they should give due weight to this pre-

sumption; *but a charge that*, where the facts are equally susceptible of either construction, the presumption is that death was the result of an accident *is only appropriate* in cases where the cause of death is unexplained, as, for example, where a man's body is found in a room with a discharged revolver by his side and there *is no other evidence in the case*. The Court confused this rule of presumption, which is available only for the purpose of taking the place of direct testimony, with the burden of proof."

The particular portions of the Court's charge to the jury here complained of are—

"under the evidence in the case, the plaintiff had made out her cause of action entitling her to recover the stipulated amount of insurance, unless that right is found by you to have been defeated by the act of the deceased in taking his own life." \* \* \* (Tr. 291.)

"Suicide or self-destruction, being at variance with the ordinary human instincts, and involving a wrongful act, is never to be presumed, but must be proved or established by evidence sufficiently satisfactory to *overcome the presumption against it*, and to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of the death of the person involved other than that of self-destruction. The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to *overcome the presumption of the innocence* of the deceased of the wrong

involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, rather than accident, mischance, or violent injury inflicted at the hands of another." \* \* \* Tr. 291.

"The COURT.—Well, that is covered by the charge of the Court when it instructs the jury that *the evidence must enable them to find that the death was the result of self-destruction, or of course the plaintiff would be entitled to recover.*

"*The burden, gentlemen of the jury, being upon the defendant to establish its affirmative defense that this death was the result of self-destruction, it follows, as I have heretofore suggested to you—perhaps counsel didn't notice it—that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, if it leaves you in doubt, then, of course, the defendant will not have sustained the burden of proof by a preponderance of the evidence, and your verdict will necessarily be for the plaintiff.*" (Tr. 299, 300.)

Lincoln v. French, 105 U. S. 617, the Court says:

"Presumptions are indulged in to supply the place of facts; they are never allowed against ascertained and established facts. When facts appear, presumptions disappear."

Agan v. Metropolitan Life Ins. Co., *supra* (Wis.), 80 N. W. 1020, 1022, the Court says:

"It is said that the legal presumption is that the circumstance which caused Griffin's death



was the result of accident or some outside human agency, and that is true. But it is a rebuttable presumption and easily yields to physical facts clearly inconsistent with it. The highest crime known to the law may be established overcoming the legal presumption of innocence, by circumstantial evidence alone; and so may an essential fact, and more easily, within the rules of law and of reason, in a civil case. What circumstances were there here to support the presumption of accident or outside agency? *None resting in reason, must be the answer.* We say that confidently. Different minds *cannot reasonably* come to different conclusions from the evidence on that subject."

In conclusion, and upon the whole case, we respectfully and most earnestly insist that the Court erred in all and each of the particulars hereinabove specified; that such errors were prejudicial to defendant, and that the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Plaintiff in Error.

JAMES H. McINTOSH,

Of Counsel.

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

---

NEW YORK LIFE INSURANCE COM-  
PANY, a corporation,

*Plaintiff in Error,*

vs.

MATILDA C. NEASHAM,

*Defendant in Error.*

---

**Upon Writ of Error to the United States  
District Court of the District of Nevada,  
Honorable Wm. C. Van Fleet, Presiding**

---

**BRIEF AND ARGUMENT FOR DEFENDANT  
IN ERROR**

---

**THOMAS E. KEPNER,**  
*Attorney for Defendant in Error, Reno, Nevada*



No. 3057

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

NEW YORK LIFE INSURANCE COM-  
PANY, a corporation,

*Plaintiff in Error,*

vs.

MATILDA C. NEASHAM,

*Defendant in Error.*

---

**Upon Writ of Error to the United States  
District Court of the District of Nevada,  
Honorable Wm. C. Van Fleet, Presiding**

---

**BRIEF AND ARGUMENT FOR DEFENDANT  
IN ERROR**

---

**PRELIMINARY STATEMENT:**

This is an action by the widow of William C. Neasham, deceased, against the New York Life Insurance Company, a corporation, to recover on



the contract of insurance, No. 4707986 appended to the original record, issued by said company to her husband, in which contract she is named as beneficiary. The contract was made and delivered in July, 1914, and is payable by its terms on due proof of death. It contains a stipulation or condition, printed on the third page, avoiding the contract in the event of self-destruction during the first insurance year (Record, page 5). The insured met a violent death, during the first insurance year, to-wit, February 27, 1915; proofs of death were made on March 15, 1915; payment was refused, and this action was commenced by the beneficiary (Defendant in Error) in the Nevada State court on April 30, 1915. The case was thereafter removed by the New York Life Insurance Company, but without any opposition on the part of the beneficiary, to the United States District Court of the District of Nevada; a demurrer was thereupon, by said Company interposed and thereafter overruled (Record, page 9); the company (Plaintiff in Error), in its amended answer, averred that the insured died during the first insurance year, from a self-inflicted gunshot wound—a suicide (Record, pages 9-13); the beneficiary (Defendant in Error) replying to the new matter set up in the amended answer, after denying the allegations thereof, alleged that the insured came to his death

**(A) At the hands of some person or persons unknown to her,** (Reply, paragraph II, Record, page

14) ; or (B) **That he came to his death from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff.** (Reply, paragraph V, Record, page 16.) The issue, thus presented by the pleadings involving three theories of the cause of death, namely, Murder, Suicide, and Accident, was tried before Hon. Wm. C. Van Fleet and a jury; the jury found the issue in favor of the defendant in error for the full amount of the contract of insurance and interest (Record, page 16) ; judgment was thereupon duly entered against said company (Plaintiff in Error), on March 10, 1916, for the sum of \$10,689.30 and costs taxed in the sum of \$175.72 (Record, page 17). The defendant company thereupon interposed its motion for new trial, which was considered by the District Court, a supersedeas bond was given, and on January 13, 1917, the motion for new trial was argued and thereafter submitted to the court and on July 16, 1917, said motion for new trial was duly denied (Record, pages 18 to 42, inclusive, and pages 51 and 52).

The case is here upon writ of error sued out by said New York Life Insurance Company, as Plaintiff in Error, and a stay bond or supersedeas was given. (See Stipulation as to Printing the Record, paragraph 7, Record, page 330.)

## B R I E F:

### I.

NEITHER IN MAKING PROOF OF DEATH

ON A CONTRACT OF LIFE INSURANCE, PAYABLE BY ITS TERMS ON DUE PROOF OF DEATH, NOR IN THE ALLEGATIONS OF A COMPLAINT THEREUNDER, IS IT NECESSARY FOR THE BENEFICIARY TO ALLEGE THE CAUSE OF DEATH, OR TO ANTICIPATE DEFENSES. A PRIMA FACIE CASE FOR THE BENEFICIARY UNDER SUCH POLICY CONSISTS IN SHOWING—  
 (A) THE EXISTENCE OF THE CONTRACT;  
 (B) THE DEATH OF THE INSURED; AND  
 (C) THE FURNISHING OF PROOF OF DEATH.

Assignment I, and paragraph 5, Assignment II, Record, pages 52, and 54;

Charter Oak Life Insurance Company vs. Rodel, 95 U. S., 232;

Aetna Life Insurance Company vs. Milward, 118 Kentucky, 716;

4 American and English Annotated Cases, 1092;

82 Southwestern Reporter, 364;

68 L. R. A., 285;

Security Bank vs. Equitable Life Assurance Society, 112 Virginia, 642;

27 American and English Annotated Cases, 836, 842;

Coffin vs. New York Life Insurance Company, 127 Federal Reporter, 555;

- Kendrick vs. Mutual Life Insurance Company,  
124 North Carolina, 315;  
70 American State Reports, 592;  
Starr vs. Aetna Life Insurance Company  
(Wash.), 4 L. R. A., new series, 636;  
Redmen's Fraternal Association vs. Rippey  
(Indiana), 50 L. R. A., new series, 1006;  
25 CYC., 917.

## II.

THE LOVE OF LIFE IS INSTINCTIVE. SELF-PRESERVATION IS ITS FIRST AND STRONGEST LAW. THE PRESUMPTION OF LAW AND FACT IS AGAINST SUICIDE. THE BURDEN OF PROVING SELF-DESTRUCTION RESTED UPON THE DEFENDANT COMPANY. IN OTHER WORDS, THE BURDEN RESTED UPON PLAINTIFF IN ERROR TO BRING THE CAUSE OF DEATH, BY A FAIR PREPONDERANCE OF COMPETENT EVIDENCE, WITHIN THE EXCEPTION OF THE POLICY RELIED UPON.

- Assignments Nos. I, II, and III, Record, pages  
52, 53, 54, 55, 56;  
Aetna Life Insurance Company vs. Milward,  
118 Kentucky, 716;  
4 American and English Annotated Cases,  
1092;  
82 Southwestern Reporter, 364, 366;  
68 L. R. A., 285;



- Standard Insurance Company vs. Thornton,  
100 Federal Reporter, 582;  
49 L. R. A., 116;
- Kornig vs. Western Life Indemnity Company,  
102 Minnesota, 31;  
112 Northwestern Reporter, 1039;
- Lindhahl vs. Supreme Court I. O. F. (Minn.);  
110 Northwestern Reporter, 358;
- Starr vs. Aetna Life Insurance Company, 4  
L. R. A., new series, 636;
- Redmen's Fraternal Association vs. Rippey,  
50 L. R. A., new series, 1006;
- Jenkin vs. Pacific Mutual Life Insurance  
Company, 131 Cal. 121, 83 Pacific Reporter,  
180;  
75 Northwestern Reporter, 445;
- Burnham vs. Interstate Casualty Company,  
117 Michigan, 142;  
75 Northwestern Reporter, 445;
- Elliott on Evidence, Sections 2391, 2394;
- Insurance Company vs. Hairston, 108 Vir-  
ginia, 832;  
128 American State Reports, 989, 1004.

### III.

EXPERT WITNESSES WERE NOT, AND SHOULD NOT BE, PERMITTED TO DECIDE THE CASE. PARTIES ARE ENTITLED TO THE VERDICT OF A JURY, WHICH IS USUALLY SAFER THAN THE OPINIONS OF HIRED

AND GENERALLY BIASED PROFESSIONAL WITNESSES. THE QUESTION WHETHER OR NO THE DEATH WOUND WAS SELF-INFLICTED IS NOT THE SUBJECT OF EXPERT OPINION.

- Assignments Nos. IV and V, Record, pages 56 and 57;
- Manhattan Life Insurance Company vs. Beard, 66 Southwestern Reporter, 35;
- Aetna Life Insurance Company vs. Kaiser, 115 Kentucky 539;
- 74 Southwestern Reporter, 203;
- Furbush vs. Maryland Casualty Company, 131 Michigan, 234;
- 91 Northwestern Reporter, 135;
- 100 American State Reports, 605;
- 2 Jones Commentaries on Evidence, 372, 373;
- Ferguson vs. Hubbell, 97 New York, 507;
- 49 American Reports, 544.

#### IV.

WHERE THE EVIDENCE IS SUCH AS TO ADMIT THE THEORY OF SELF-DESTRUCTION, MURDER, OR ACCIDENT, EVERY CIRCUMSTANCE SURROUNDING THE DEATH IS ADMISSIBLE IN ORDER TO ENABLE THE JURY TO ANSWER THE QUESTION,—HOW AND BY WHOM WAS THE DEATH WOUND INFLICTED?

Assignment No. VI, Record, page 58;

Kornig vs. Western Life Indemnity Company,  
102 Minnesota, 31;

112 Northwestern Reporter, 1039;

Metropolitan Life Insurance Company vs. De  
Vault's Administrator, 17 American and  
English Annotated Cases, note at page 35.

## V.

DEPOSITIONS OR STATEMENTS OF WITNESSES MADE BEFORE A CORONER'S JURY AT AN INQUEST MAY BE USED ON THE TRIAL OF A CASE ARISING OUT OF THE DEATH OF THE PERSON UPON WHOSE BODY THE INQUEST WAS HELD TO CONTRADICT OR IMPEACH SUCH WITNESSES. SECTION 7550 OF THE REVISED LAWS OF NEVADA, BORROWED FROM SECTION 1515 OF THE PENAL CODE OF CALIFORNIA, PROVIDES THAT—"THE TESTIMONY AT SUCH INQUEST SHALL BE REDUCED TO WRITING BY THE JUSTICE OF THE PEACE, ACTING AS CORONER, OR AS HE MAY DIRECT, AND BY HIM, WITHOUT DELAY, FILED IN THE OFFICE OF THE CLERK OF THE DISTRICT COURT OF THE COUNTY."

Assignment No. VII, Record, page 58;

7550 Nevada Revised Laws, 1912;

1515 Penal Code of California;

7 Encyclopedia of Evidence, 54, 57.

## VI.

THE PRESUMPTION IS ALWAYS AGAINST CRIME. IN AN ACTION ON A CONTRACT OF LIFE INSURANCE, PAYABLE BY ITS TERMS ON DUE PROOF OF DEATH, IF THE EVIDENCE BE SUCH AS TO ADMIT THE THEORY OF MURDER, SUICIDE, OR ACCIDENT, THE PRESUMPTION IN FAVOR OF ACCIDENTAL DEATH IS CONTROLLING.

Assignment No. XI, Record, page 62;

Aetna Life Insurance Company vs. Milward,  
118 Kentucky, 716;

4 American and English Annotated Cases,  
1092;

82 Southwestern Reporter, 364, 336;

68 L. R. A., 285;

Home Benefit Association vs. Sargent, 142  
United States, 691;

Boynton vs. Equitable Life Assurance Society,  
105 Louisiana, 202;

52 L. R. A., 687;

Kornig vs. Western Life Indemnity Company,  
102 Minnesota, 31;

112 Northwestern Reporter, 1039;

Fidelity & Casualty Company vs. Love, 111  
Federal Reporter, 773;

National Union vs. Fitzpatrick, 133 Federal  
Reporter, 694;

Grand Lodge vs. Beck, 181 U. S., 49;



O'Conner vs. Modern Woodmen of America,  
25 L. R. A., new series, 1244;

Metropolitan Life Insurance Company vs. De  
Vault's Administrator, 109 Virginia, 392;  
17 American and English Annotated Cases,  
27;

Modern Woodmen of America, vs. Kincheloe,  
175 Indiana, 563;  
28 American and English Annotated Cases,  
1259, 1262;

Grand Lodge vs. Bannister, 80 Arkansas, 185;  
96 Southwestern Reporter, 742.

## VII.

IF AN EXAMINATION OF THE EVIDENCE  
DISCLOSED BY THIS RECORD IS PERMISS-  
IBLE UNDER THE ASSIGNMENTS OF ER-  
ROR ALLEGING THAT THERE IS NO EVI-  
DENCE TO SUSTAIN THE VERDICT, A  
CANDID EXAMINATION OF ALL OF THE  
EVIDENCE IN THE CASE WILL LEND NO  
COMFORT TO PLAINTIFF IN ERROR.

CIRCUMSTANCES MUST BE PROVED, NOT  
ASSUMED. THAT A PRESUMPTION CAN-  
NOT BE BASED UPON A PRESUMPTION, AN  
ASSUMPTION OF FACT DRAWN FROM AN-  
OTHER ASSUMPTION OF FACT, OR AN IN-  
FERENCE OF FACT PREDICATED UPON  
ANOTHER INFERENCE OF FACT, IS A FUN-  
DAMENTAL PRINCIPAL OF LOGIC AND

OF LAW. STARTING WITH THE THEORY OF SUICIDE, PLAINTIFF IN ERROR ASSUMES THAT INSURED SHOT HIMSELF, BECAUSE IT IS ASSUMED THAT HE INTENDED TO DESTROY HIMSELF, BECAUSE IT IS ASSUMED THAT THE DEATH WOUND (LARGE AS THE MIDDLE FINGER OF A MAN'S HAND) WAS CAUSED BY THE LITTLE .32 CALIBER SAVAGE AUTOMATIC PISTOL FOUND NEAR THE BODY, BECAUSE IT IS ASSUMED, IN THE FACE OF DIRT IN THE BARREL, THAT THE PISTOL HAD RECENTLY BEEN DISCHARGED.

SUCH A METHOD AT ARRIVING AT AN ULTIMATE FACT IS UNIFORMLY CONDEMNED.

Assignments II, VIII, IX, X, XII, XIII and XIV, Record, pages 52, 59, 61, 66, 68;

1 Moore on Facts, 599;

14 Encyclopedia of Evidence, 101;

3 Chamberlayne's Modern Law of Evidence, 1764;

Evansville Metal Bed Company vs. Loge, 85 Northeastern Reporter, 979, 981;

United States Fidelity & Casualty Company vs. Des Moines National Bank, 145 Federal Reporter, 273;

Cosgrove vs. Pitman, 103 California, 268;

United States vs. Ross, 92 U. S., 281;

Manning vs. John Hancock Mutual Life Insurance Company, 100 United States, 693, 699;

Globe Accident Insurance Company vs. Gerisch, 163 Illinois, 625;

54 American State Reports, 486;

Modern Woodmen of America vs. Kozak, 63 Nebraska, 153;

88 Northwestern Reporter, 248;

Truckee River General Electric Company vs. Benner, 211 Federal Reporter, 79, 81.

## ARGUMENT:

### I

In alleged error, number I, it is contended that the demurrer to the complaint was improperly overruled. In subdivision 5, Assignment No. II, it is suggested that the proofs of death (Record, pages 308, 313) were insufficient. The contention seems to be both with reference to the complaint and proofs of loss, that "it does not appear \* \* \* whether the insured, William C. Neasham, was or was not guilty of self-destruction;" (See Record, page 6, for the demurrer, and page 54 for assignment relating to proofs of death.) The complaint contains a concise statement of the contract of insurance, the consideration therefor the furnishing of due proofs of death, and the failure of the defendant company to pay the amount of the contract. This is a sufficient complaint under the

general law on the subject of life insurance. It is well settled that in an action on such contract—

“The complaint need not anticipate defenses, such as limitations, **death by suicide**, the falsity of answers of the insured in his application, or that an assignment of the policy is void as a wagering transaction.”

25 CYC., 917;

Record, pages 1 and 2.

There is nothing in the language of the contract which forms the basis of this action which, in any manner, changed the general rule above stated, or made it necessary for the beneficiary (Defendant in Error) to depart from the usual rules of pleading.

Record, pages 4 and 5.

In **Charter Oak Life Insurance Company vs. Rodel**, (95 U. S.), the Supreme Court speaks specifically of the sufficiency of the proofs of loss, which in effect states the requirements of a **prima facie** case for plaintiff in an action on a contract of life insurance very like the one presented in the instant case. Mr. Justice Bradley, delivering the opinion of the Supreme Court, used this language:

“Of course, the company could not justly contend that it might arbitrarily object to the sufficiency of the proofs; but it had an undoubted



right to demand and insist upon such proofs as the law would adjudge to be reasonable and satisfactory. The objection to those furnished was that, whilst otherwise sufficient as proofs of death of the insured, they disclosed at the same time a cause of death which exempted the company from liability; and hence could not be said to be sufficient proof of 'the just claim of the assured' as well as of the death of Rodel.

\* \* \* \* Proof of death was all that was required. This was given and does not appear to have been objected to."

Record, page 83.

In **Kendrick vs. Mutual Life Insurance Company** (124 North Carolina, 315, 70 American State Reports, 592), the Supreme Court of North Carolina, speaking of the elements necessary to a **prima facie** case for the beneficiary, in an action on a contract of life insurance very like the one which forms the basis of this suit, used the following language:

"Plaintiff to whom the policy was payable, was in possession of the policy at the death of the insured, and, the death of the insured being admitted, this made out a **prima facie** case."

In **Aetna Life Insurance Company vs. Milward** (118 Kentucky, 716, 4 American and English Annotated Cases, 1092), the contract of insurance

declared upon insured against injury and death resulting from external, violent and accidental means, and contained many provisions for graduated indemnity, depending upon the nature and extent of the injury, and the calling and exposure of the insured, more to be paid in certain contingencies than in others. The Supreme Court of Kentucky, said:—

“In a suit upon such policy, it is not necessary for the plaintiff to state that he was not suing to recover under certain clauses not relied on, or for certain injuries not received, nor to negative any of the provisions of the policy not made conditions precedent to his right to institute the suit.”

In **Kornig vs. Western Life Indemnity Company** (102 Minnesota, 31), the supreme Court of Minnesota, disposed of a contention such as that presented by the plaintiff in error in the assignments referred to, in these words:

“It is the defendant who must, when circumstantial evidence is relied on, establish such facts as preclude the hypothesis of natural, violent, or accidental death. **The burden of proof does not rest on the plaintiff to establish such facts as justify demonstrate or the theory of death otherwise than by the hand of the insured himself, in order that the jury may find against death by suicide.**”

If any proposition can be said to be established, it is that in an action on a contract of life insurance, payable by its terms on due proof of death, the person seeking to recover need not allege that the death of the insured did not result from any cause, which, by the terms of the contract, would relieve the company from liability thereunder. The learned editors of the *Lawyers Reports Annotated* in *Starr vs. Insurance Company* (4 L. R. A., new series, 636); and *Redmen's Fraternal Association vs. Rippey* (50 L. R. A., new series, 1006) have in elaborate notes, covered the whole subject regarding presumptions, burden of proof, and the appropriate allegations of a complaint in actions of this character and to those notes attention is invited.

## II

The next group of alleged errors, namely, I, II, and III, presents but the one question of law: Upon whom is the burden of proving suicide? More specifically (a) the first assignment avers that the demurrer to the complaint was improperly overruled, which has been satisfactorily disposed of. (b) The second assignment presents a variety of suggestions as to why the District Court erred in denying the motion of plaintiff in error for a nonsuit or directed verdict at the conclusion of the case in chief for the beneficiary (Defendant in Error), **all of which are based upon the fallacy that the burden was upon the beneficiary to prove**

that the insured did not commit suicide. It is probable that the matters complained of in this second assignment are not subject to review for the reason that they involve an examination of the evidence (**Truckee River General Electric Company vs. Benner**, 211 Federal Reporter, 79); but, in any event, the only question of law presented by this alleged error, is the same as that presented by the first, and (c) the same question is presented in converse form in Assignment III, —Complaint is there made that the District Court imposed the burden of proving self-destruction upon Plaintiff in Error.

Record, pages 52, 53, 54, 55 and 56.

So this group of alleged errors presents but the one question of law regarding the burden of proof in actions of this precise kind, where the issue raised by the pleadings admits the theory of Murder, Self-Destruction or Accident, and the proof is wholly circumstantial. How and by whom was the death wound inflicted? The contentions of Plaintiff in Error have been urged, time and time again, both in the Federal and State courts, and have been uniformly overruled where the action was predicated upon a contract of life insurance, payable by its terms, on due proof of death. That the presumption of law is against suicide, and the burden of establishing that fact by a fair preponderance of competent evidence, is upon the insurance company has been settled beyond candid dis-



pute in a long line of cases; but, so far as the research of Counsel has gone, there has been no decision on this question in the Circuit Court of Appeals for the Ninth Circuit, and a few of the authorities, limited to those particular cases where the facts presented were at least as sinister as those relied upon by Plaintiff in Error, will out of an abundance of caution be briefly reviewed.

**In Aetna Life Insurance Company vs. Milward** (4 American and English Annotated Cases, 1092), the circumstances surrounding the death of the insured, as stated by the Supreme Court of Kentucky, were as follows:

“The insured was found dead from the effect of a pistol shot wound in the head. His body, partially disrobed as he had slept, was discovered lying in a small porch or entry, which was partially enclosed at the rear of his residence. By his side were two pistols, both loaded, but in one a discharged cartridge. The shot entered his head on the left side, behind the ear, and passed through in nearly a straight line. The two pistols were lying rather to his right side. He was right-handed. His domestic relations were apparently pleasant, being happily married. He had, also, two young children. His health was good. His mercantile business was prospering satisfactorily. He was about thirty-four years old, and a man of good habits and character. The shot which killed him was fired

about dawn, November 21, 1900. It was heard by but one person who testified in the record. The tragedy was unseen by any witness in the case. Appellee, widow of deceased and her two infants slept in an upstairs room, but were not aroused by the shot. There was no other evidence of violence, nor of the presence of another person at the scene of the killing. The backyard, where it occurred, had walks leading to it which were paved, and would not, for that reason, have shown tracks. One of the pistols probably belonged to the deceased, or had recently been in his possession. It was a nickle-plated Iver-Johnson revolver. The other, a blue steel barrel pistol, was not identified as to its ownership. It was from the latter the fatal shot was fired. There was some evidence that the insured was a man of intense application to business, was of a nervous temperament; that he had a year or so previous to his death consulted a physician, who had advised him to take a rest on account of nervous exhaustion or depression, and that he took a vacation of two or three weeks in the northwest. After his return the physician found him restored to health and quit treating him. A few days before his death deceased complained of pain in the back of his head."

Discussing these facts, the Court said (4 American and English Annotated Cases, at page 1093)—

"Appellant argues that the verdict is flagrant-

ly against the evidence, because, it is contended, the evidence, of which the foregoing is a fair epitome, shows clearly that the death was suicide; or, in any other view of it, fails to show that the death was caused by accidental means, and therefore there was a failure of proof on behalf of the plaintiff. As indicated the evidence is wholly circumstantial. It may none the less point as unerringly to a correct conclusion as if detailed by eye witnesses. It will not do to say that in such case the jury is required to 'guess' the cause. It is unlike where the circumstances do not show the cause of the occurrence. \* \* \*

The nature of the wound shows conclusively that the cause of death was both violent and external. The date of the occurrence is within the duration of the policy of insurance. The only remaining question was whether it was accidental in the meaning of the contract. Aside from legal presumptions, about which the jury were not instructed in this case, though they may properly have been, we are unable to say from the evidence that the verdict is not true. It is reasonably clear, at least most probable, that if the deceased had a pistol at all, it was the one, and so far as the record shows the only one to which he had access—the nickle-plated revolver—from which the fatal shot was not fired. That it was not fired by him is indicated by the place of the wound, its entry being on the opposite side

of the head from that which would have been the easiest and most natural if suicide had been done. Absence of scorching of the hair and of powder burn in sufficient quantity also negative the theory that a right-handed man had placed the muzzle of the pistol where it must have been done by decedent to have inflicted that shot. That the pistols were found on the right side of the body seems to refute the theory that decedent, contrary to his habit and instinct of using his right hand, used his left in this act. The instantaneous effect of such a wound is to produce paralysis of the volition. Death was immediate, so far as the ability to dispose of anything in his hand was concerned. The surrounding circumstances are not in harmony with the view that the insured took his own life. They tend to show that the act was not the probable course of a sane person who was bent upon destroying his life. There was no hint in the evidence of any symptom of insanity. Circumstantial evidence tells the story of a past transaction by the similitude between the things shown to have been done and what in the experience of mankind has been found to be generally the cause or result of similar occurrences. From these the mind deduces the most probable cause of the occurrence in question. The result of this process of reasoning has been found to be so unvarying as to justify its adop-



tion as a rule of evidence. The jury were authorized to apply to the facts detailed their knowledge of human nature, and to indulge, in the aid of deduction, predicated upon the established facts, those presumptions which common experience has established, and which therefore the law allows. The love of life is instinctive; self-preservation is its first, as it is its strongest, law. In the absence of mental derangement, of any known fact, calculated to unseat the judgment and overcome the love of life, the inquiring mind naturally and properly looks for other causes of the deed when death by violence occurs. When all the facts are inconsistent with the theory of suicide, except simply that of the dead body in the presence of its instrument, it would be unnatural and illogical to confine the inquiry to that incident and declare the death suicide. The act of suicide is not only unnatural, but is highly immoral and criminal. The presumption of law is against it; so is the presumption of fact. The jury ought to have given place to that presumption in determining what, in the light of the evidence, was the cause of the death. By this process they were warranted, under the evidence in this case, in saying that the death was not suicide.

“Nor does the law presume that murder or other crime was committed. There was not enough evidence probably to say that murder

was done. Still, the inquiry had led the jury to logically say that the death was from a cause violent and external, and not purposely self-inflicted. Such a wound, not having been inflicted with suicidal intent, was necessarily done by the decedent unintentionally, or, as the evidence indicated to be more likely, was done by some one else. As the presumption is also against crime, in the absence of evidence of that fact, the jury was not authorized to say that the wound was purposely inflicted by another. The conclusion from this state of the record inevitably follows that decedent came to his death by an unintentional, that is, an accidental, shot fired either by himself or by some other person unknown to the jury. Nor does it matter, so far as the liability of appellant is concerned, which it was. In either event it was an accidental death, within the meaning of the policy of insurance."

**In Standard Life Insurance Company vs. Thornton** (100 Federal Reporter, 582), Mr. Justice Day, speaking of the presumption against suicide and the weight and effect of that presumption in an action of this character, used these words:

"This presumption must stand in the case and be decisive of it, until overcome by testimony which shall outweigh the presumption. It casts upon the defendant, who claims that the

death was intentional, the burden of establishing it by a preponderance of evidence."

In **Lindhal vs. Supreme Court, Independent Order of Foresters** (110 Northwestern Reporter, 358), the supreme court of Minnesota had before it a case where the issues presented were very like those here, and the rules generally accepted on this subject were thus summarized by Mr. Justice Elliott, sometime lecturer on the subject of insurance in the University of Minnesota, and the author of a number of text-books, including *Insurance and Corporations*:

"The defense being suicide, it is held (a) The burden of proving that the deceased committed suicide is upon the defendant. (b) The presumption is against suicide. (c) If the known facts are consistent with the theory of natural or accidental death, the presumption which the law raises from the ordinary motives and principles of human conduct requires a finding against suicide. (d) When circumstantial evidence is relied on, the defendant must establish facts which exclude any reasonable hypothesis of natural or accidental death."

Continuing (110 Northwestern Reporter, page 361, column 2), the Supreme Court of Minnesota said:

"The burden is upon the defendant to show that the circumstances and conditions are incon-

sistent with any other reasonable cause of death than that of suicide; that is, it must eliminate and disprove all other causes of death which are consistent with the evidence before the jury is justified in inferring that the deceased committed suicide."

**In Starr vs. Insurance Company** (4 L. R. A., new series, 636), the following is found:

"It would seem, however, that where the death of the assured must have resulted from murder, suicide, or accident, the evidence excluding any other hypothesis, the death would be presumed to be accidental; neither the presumption that it was self-inflicted, nor that it was intentionally caused by another, can be indulged in. Indeed, the presumption is that it was not."

**In Jenkin vs. Pacific Mutual Life Insurance Company**, (131 California, 121), the supreme Court of California had under consideration a case where the insured was found dead from the effects of a gunshot wound, there being no evidence in the record to show either how or by whom the injury was inflicted. The following language is pertinent:

"That the courts will presume that the death was the result of accident, when nothing more is shown than that it was brought about by a violent injury, and the character of such injury is consistent with the theory of accident, seems



to be a rule upheld by the great weight of authority."

In **Burnham vs. Interstate Casualty Company** (117 Michigan, 142), it was contended that the inferences deducible from the testimony were consistent with three theories as to the cause of death, namely, apoplexy, sudden seizure, and suicide, and therefore no one theory was proved. The Supreme court of Michigan disposed of that contention in these words:

"The testimony does not establish facts to overcome the presumption. Where death may be attributed to suicide, murder, accident or negligence, the presumption of law is against suicide and murder."

The text-writers adhere to the same opinion. In **Elliott on Evidence**, section 2391, the following is found:

"The presumption of law is always against suicide. This presumption is so strong that the courts usually require some evidence of an intention of suicide, as the intent is regarded as the gist of the act. This presumption against suicide is also strong enough to rebut the usual and natural inferences that might arise from conditions and circumstances ordinarily pointing to suicide. Thus, where the insured was found dead, lying on his back, with a pistol in his right hand which was lying across his breast,

and there was a pistol or gunshot wound in his right temple, this was held insufficient evidence of suicide. In all such cases the law presumes that the wound which caused death was the result of accident. This rule is carried to the extent that where it is evident that the death resulted from accident or suicide, and the evidence fails to show which was the cause, or where from all the evidence in the case the cause of death may be equally referred either to accident or intention, the law will presume that the death was accidental and not intentional. Where a body is found and there is no direct or positive evidence as to the cause of the death, the law will presume that it was caused neither by suicide or murder. And it has been held that where the evidence is equally balanced, or so nearly so as to leave the question in doubt, the finding should be against the theory of suicide. The presumption is that the death of the insured was not voluntary. The law presumes every person to be sane, and there is no presumption of insanity from the fact of suicide.

Continuing, with section 2392, the author says:

“As the presumption of law is against suicide and that proof of death is sufficient to entitle the plaintiff to recover, it follows naturally that the burden of proof is on the insurer to show by a preponderance of the evidence that the wound resulting in death was intentionally self-inflict-

ed. And this rule is not changed by the fact that the proofs of death stated the cause of death as suicide. Where a life policy provided that it shall be void in case the insured shall 'under any circumstances die by his own hand,' to bring the case within this proviso it was held that the burden was upon the defendant to establish intentional suicide.

Further, at section 2393:

"In establishing the fact of suicide some courts require the proof to be so certain and conclusive that reasonable men must necessarily infer from the evidence that the death was the result of design and not of accident. The element which distinguishes between accident and suicide is the question of intent. Hence where suicide is relied upon as a defense an important if not a controlling feature is as to whether or not the wound was inflicted with the intent to take life. The intention to commit suicide may be shown by proving declarations to that effect, but such declarations must be limited, in order to be admissible, to or near the time of the alleged act. They must be so near in point of time as to justify a reasonable probability, taken with other evidence in the case, that the insured carried his declared intention into execution. And it is held that suicide threatened or attempted, or actually committed, is competent evidence up-

on such an issue. And it is the rule that where the evidence is so clear as to exclude any other rational hypothesis than that of suicide, it is sufficient, the ordinary presumption against the fact of suicide will not be permitted to overcome or destroy such rational conclusion deducible from the clear and definite proof. In proof of suicide the location of the wound is important. Wounds or injuries inflicted for the purpose of self-destruction are usually upon the front or right side of the body.

And, finally at Section 2394, the learned commentator says:

“No definite or general rule can be stated as to the extent or degree of proof considered sufficient to establish the theory of suicide. It is evident that it must be sufficient to overcome the presumption against the voluntary taking of one’s own life. And if the circumstances proved to establish the theory of suicide leave a reasonable hypothesis that death resulted in any other manner the evidence will be regarded as insufficient. A general rule might be formulated to the effect that the preponderance required of the insurer in order to overcome the proof and presumption against suicide must be such as to exclude with reasonable certainty any hypothesis of death by accident or by the act of another. Thus it was held insufficient to defeat an action on a policy, providing that it shall be void if the



assured shall die by his own hand, to prove the death was caused by taking poison, and that the insured was sane at the time, for the reason that if the poison was taken by mistake or unintentionally the claimant would be entitled to recover. And it has been held that proof of death resulting from insanity does not prove death by suicide. In the absence of other evidence if the proof shows death by insanity, the legal presumption is that it is a natural death from a natural cause and not from an act of self-destruction."

To summarize on this point. The burden of proof does not require the insurer to establish the fact of suicide beyond reasonable doubt, neither is a mere preponderance of evidence sufficient; but the theory of suicide to avail must be established by a fair preponderance of evidence, which is sufficiently cogent and convincing as to exclude, with reasonable certainty, every reasonable theory of death by accident, assassination, or negligence. As graphically stated by the supreme court of Virginia:—

"the burden of proof to establish such a defense is upon the defendant, he must make it out by clear and satisfactory proof—**no proof beyond a reasonable doubt, nor a preponderance in the ordinary sense, but such a preponderance as is necessary to overcome the presumption of innocence of moral turpitude or crime.**"

Insurance Company vs. Hairston, 108 Va.,  
832;

128 American State Reports, 989, 1004.

Enough has been said to justify the assertion that the burden of proof in the instant case was properly imposed upon the Plaintiff in Error. The principles upon which this action is predicated have become axiomatic and there is a singular unanimity in their application. It seems very clear, therefore, that the demurrer was properly overruled; that there was no error in denying the motion of the insurance company for non-suit, either upon the ground that the beneficiary did not prove the cause of death or otherwise; and that the burden of proving self-destruction, the burden of bringing the cause of death of the insured within the exception or condition of the policy relied on, necessarily rested upon Plaintiff in Error.

### III

The next group of alleged errors (Assignments IV and V), concerns the alleged error of the District Court in sustaining objections to certain questions propounded by plaintiff in Error to its so-called expert witnesses, namely, Doctor S. C. Gibson and Doctor S. K. Morrison.

Counsel is constrained to call attention to the fact that these alleged errors are not based upon correct premises, as an examination of the record will demonstrate.

(A) The first two questions included in Assignment IV, although ruled out in their stated form were in effect answered by the witness. Those questions appear in the printed Record at page 199. The learned trial Judge made certain suggestions to Counsel for Plaintiff in Error, which appear on pages 200 and 201 of the Record, from which the following is an excerpt:

“The COURT: It is perfectly competent to ask this witness how such a wound might be produced, by what sort of instrumentality; whether it was a gunshot wound, or knife wound; and you can ask him whether, under ordinary conditions, a wound of that kind could be produced from some external source, without lacerating the lips or the tongue, or breaking the teeth, or things of that kind, and from those things the jury can draw the deduction you are asking this witness to state as an expert. It is not the subject of expert deduction.”

Record, page 201.

And Counsel for Plaintiff in Error availed himself of the suggestions of the Court and proceeded to ask the questions appearing on pages 201, 202, 203 and 204 of the printed record. Then after cross-examination of the witness (Doctor S. C. Gibson) had been commenced, distinguished Counsel for Plaintiff in Error, again adverted to the inquiry which was referred to in the former direct

examination, as shown on page 199 of the printed Record, and those questions were again put in the following form:

“Mr. HAWKINS: May I just ask one more question, your Honor?

“Q. Basing your testimony upon your experience and your examination of the deceased, Mr. Neasham, I ask you to state whether or not in your opinion the wound was produced by a near shot or one fired from a distance?

“Mr. KEPNER: That is objected to as incompetent; it has already been gone into.

“The COURT: There has been no foundation laid for him to express an opinion upon a question of that kind.

“Mr. HAWKINS: Notwithstanding it is admitted that he came to his death by a gunshot wound, your Honor?

“The COURT: That don't make any difference. You are asking a question now which involves the knowledge of this witness as to the effect of a gunshot wound produced from a distance as compared with one at close range; this witness has not disclosed any such experience.

“Mr. HAWKINS: He has testified he has been a physician for a number of years, and has had experience with gunshot wounds.



“The COURT: (Q) Have you ever had any experience which would enlighten your mind as to the distinctive effect of what counsel characterizes as a near shot or a far shot?

“WITNESS: No, unless it is powder burned.

“The COURT: Yes, of course; that is a different thing. The objection is sustained.”

Record, pages 203, 204.

And distinguished Counsel for Plaintiff in Error did not even save an exception to that ruling; yet, with a **sang froid** worthy of a better cause, assigns the ruling to the same questions appearing on page 199 of the Record as error! (Compare the questions appearing on page 199, with that appearing on pages 203, 204.)

The witness disqualified himself to answer the questions, and was permitted under the ruling complained of to tell all that he knew regarding the matter in hand. The assignment of error and the argument of Counsel for Plaintiff in Error to the contrary notwithstanding, the only foundation for this alleged error (No. IV) is with reference to the last two questions quoted therein, which for convenience are hereinafter quoted.

(B) And with reference to Assignment No. V, the first question therein stated was reformed and finally answered, as is demonstrated from the following excerpt from the Record:

“Mr. HAWKINS: (Q) Doctor, you heard Dr. Gibson’s testimony in describing the nature of the wound, and its location in the back part of the mouth of the deceased, did you?

“A. I did.

“Q. Assuming that testimony to be true, state whether or not in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?

(See, Assignment No. V, Record, page 57.)

“Mr. KEPNER: I object to that as incompetent.

“The COURT: The objection is sustained. There is no foundation for such a question here.

“Mr. HAWKINS: If the Court please, counsel said awhile ago there was no proof that this death came from a gunshot wound; plaintiff has proved that herself.

“The COURT: I am not speaking of that. Your question does not involve any element of the magnitude of the missile that was fired by the gun, or anything else—it is just a gun; it might have been one calibre, or might have been another. **That is the unfortunate thing growing out of the fact that this autopsy was not carried to a point sufficient to fully demonstrate the instrumentality that produced the death, its cali-**

bre, and so forth, except by inference, which the jury must draw.”

Record, pages 209, 210.

There was no exception saved by Plaintiff in Error to the ruling of the Court on the first question, which distinguished Counsel include in the alleged error No. V! Nor is that all.

Counsel reformed his question as follows:

“Mr. HAWKINS: (Q) Assuming the testimony of Dr. Gibson as true, particularly referring to the location of the wound, and the fact that the tongue, teeth and lips were not injured, would it in your opinion be possible to have inflicted that wound by a bullet fired from a thirty-two automatic pistol, with the pistol outside the mouth of the deceased?

“Mr. KEPNER: Objected to as incompetent.

“The COURT: I think so. The objection is sustained.

Mr. HAWKINS: We ask for an exception.”

Record, page 210.

So, the ruling to which the exception was saved is not the ruling assigned as error. But the question was again reformed and finally answered:

“Q. Could, in your opinion, a gunshot wound

be inflicted upon the deceased, making the wound described by Doctor Gibson in his testimony, without injuring the tongue, teeth or lips?

“Mr. KEPNER: Same objection.

“The COURT: No, that is precisely the same question I allowed Dr. Gibson to answer; that is, whether under normal conditions, a wound of the character described could be produced—from external sources you mean, Mr. Hawkins?

“Mr. HAWKINS: Yes.

“The COURT: From external sources, upon the person of the deceased, without injuring the lips, tongue and the adjacent soft tissues, or the teeth?

“WITNESS: Shall I answer it?

“The COURT: Yes. He is asking you whether it could, under ordinary circumstances.

“A. No, it could not.”

Record, pages 210, 211.

So, the first question included in alleged error No. V should be eliminated.

Whether the first two questions included in Assignment IV and the first question included in Assignment V was by inadvertance or with the intent to mislead is not for Counsel to determine;



suffice it to say that the only basis for Assignment of Error, numbered IV, is that the District Court sustained objection to the following questions propounded by Plaintiff in Error to its witness Doctor S. C. Gibson:

“Q. Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by some one else?

Record, page 200.

And the question was repeated,—

“Q. What is your opinion as to whether the wound was inflicted by William C. Neasham himself, or by another?”

Record, pages 202, 203.

Whilst the only foundation in the record for Assignment of Error, numbered V, is with reference to the last question included therein:

“Q. Assuming the testimony of Doctor Gibson as true—I will ask this question, your Honor, to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?”

Record, page 211.

Of course, those questions were wholly incom-

petent; The learned trial Judge, in sustaining objections to this character of inquiry, had used this language:

“The COURT: The jury is composed of sensible men; they are competent to form judgments and draw deductions; you can lay before the jury the facts, and argue to them your theory as to how this wound was produced, and they will draw their conclusion, but it is not the subject of expert testimony to ask the witness, however well versed in surgery or medicine he may be, as to whether a given wound was more likely to have been produced upon a person by the individual himself, or a third person.”

Record, page 200.

The adjudicated cases upon the precise point sustain the ruling complained of. In **Manhattan Life Insurance Company vs. Beard** (66 Southwestern Reporter, 35), the Supreme Court of Kentucky had before it a case where the trial court had allowed the character of inquiry here complained of, and in reversing and remanding the case for a new trial, the Court said:

“The circumstances about the death of the insured were such as to admit the theory of suicide. It might, though, have been an accident. On the trial a physician, introduced as an expert on the subject of insanity, after testifying about the indication of certain symptoms of insanity,

and in his opinion, if the deceased showed these symptoms, he was insane, was asked whether, in his opinion, the death was the result of accident or design, and was permitted to answer. This was error. The witness did not see the body, nor was he in attendance on his sickness. It was competent for him to say what was the probable effect of certain drugs, and what state of mind as to sanity or insanity certain symptoms would indicate; **but whether the act of the deceased in taking the drug was by design or accident was not the subject of expert testimony. That was an issue to be solved by the jury upon all the evidence."**

In **Aetna Life Insurance Company vs. Kaiser** (115 Kentucky, 539; 74 Southwestern Reporter, 203), the Court had before it a case where the insured had met his death in his own room from a gunshot wound, and the precise questions in effect, as those which form the basis for alleged errors IV and V had been ruled out by the trial Court.

The Supreme Court of Kentucky said:

"The coroner, who was a physician, was introduced as a witness, and after detailing the appearance of the body as found by him, was asked by appellant whether, in his opinion, the death of the insured was self-inflicted or not. We hold that the opinion of the witness as to the manner of the death of the insured was not a relevant

fact. **Expert evidence is not admissible to decide disputed questions of fact**—to establish by the opinion of expert witnesses whether the act under investigation occurred in this way or that. That was the exact question to be determined by the jury from all the facts and circumstances.”

So there, so here, the contention urged by Plaintiff in Error is wholly untenable. The two questions propounded to Doctor Gibson, and the one question to make the Record, repeated to Doctor Morrison involved the whole issue to be determined by the jury from all of the facts and circumstances in evidence,—How and by whom was the death wound or wounds inflicted? It is not within the province of expert witnesses, however well versed in surgery or medicine they may be, to determine such issues. That function belongs to the jury upon all of the evidence. (**Furbush vs. Maryland Casualty Company**, 131 Michigan, 234; 91 Northwestern Reporter, 135; 100 American State Reports, 605). The ruling complained of was entirely proper and should be sustained (2 Jones’ Commentaries on Evidence, Sections 372, 373). In **Ferguson vs. Hubbell** (97 New York, 507, 49 American Reports, 544), Earl, J., speaking for the Court, said:

“The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases



where that is practicable, and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts, they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgment of unskilled jurors than the opinions of hired and generally biased experts."

In the administration of criminal justice it has sometimes been held that there are exceptions to the general rule above stated, and such are the character of the authorities cited by Plaintiff in Error. For example, the case of **Miller vs. State**, (131 Pacific Reporter, 721), the indictment was for murder, the immediate cause of death being strangulation, and the trial court had permitted a question as to **whether or not the instrumentality of death could have been applied to the throat of the deceased by the victim herself**. The Court said:

"In prosecutions for murder, the testimony of medical experts, as to the cause and manner of death of the deceased, may be indispensable. The case at bar is an illustration of this. Very few persons have any knowledge or experience with reference to death caused by strangulation. Without the testimony of medical experts,

the jury would have been entirely in the dark on this subject."

And the Court quoted with approval from the case of *State vs. Lee* (65 Connecticut, 265, 27 L. R. A., 498, 48 American State Reports, 202), where the indictment was also for murder, in the performance by a doctor of an abortion upon the person of the deceased; the injury was to the uterus. **Expert testimony as to whether the injuries could have been inflicted by the victim herself was held admissible.** But there is a wide difference between that character of interrogatory and the bald questions propounded by distinguished Counsel for Plaintiff in Error in the instant case! The contention urged as error is wholly untenable. The Record discloses no foundation for any such questions as the ones excluded by the District Court. The authorities cited by Counsel do not sustain their contention.

---

#### IV

Complaint is made in alleged error numbered VI that testimony was admitted over the objection of Plaintiff in Error regarding the conditions immediately surrounding the scene of the homicide. The witness A. A. Burke, during the preceding ten years, had been a special officer for Wells, Fargo & Company, Chief of Police of Reno; Sheriff of Washoe County; Inspector and Superintendent of

the Nevada State Police. The Record shows him to be an experienced and intelligent officer. He was Superintendent of the Nevada State Police at the time of the death of the insured; he visited the scene of the tragedy, the day following its occurrence, and made a thorough examination of the locus in quo. Speaking of a point about a 100 to 125 feet from the place where the body of the insured was found, the witness said:

“I observed tracks in the ground there; the ground was a soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down.”

Record, page 235.

To give color to this assignment of error it is urged that “it was not shown or attempted to be shown that the place was in the same condition that it was on the day insured came to his death.”

Record, page 58.

Doubtless that assertion was made through inadvertance; at any rate, the fact is that Plaintiff in Error had previously shown, through its star witness Charles P. Ferrel, that **“the condition of things at the time the body was found there” were the same three or four days after the tragedy** (Record, page 153), so it would seem that the beneficiary (Defendant in Error), in her rebut-

tal, had the right to assume that the condition of things were the same on the day following the homicide.

Where it is sought to establish the theory of suicide by circumstantial evidence, every circumstance surrounding the tragedy should go to the jury. How and by whom was the death wound inflicted? In the effort to throw light on this question, it was certainly competent, in rebuttal, to show that others may have been skulking in the vicinity at or about the time of the violent death of the insured, especially in view of the fact that the defendant Company, in the attempt to show self-destruction, had brought out the fact that there were four or five persons in the immediate vicinity, at or about the time the death wound was inflicted upon the insured. The witness Charles Brown, had testified, as follows:

“Q. How many of you were there?

“A. There was three and a man named Mr. Rudolph and Mr. Huntsman.”

Record, page 118.

**In Kornig vs. Western Life Indemnity Company** (102 Minnesota, 31, 112 Northwestern Reporter, 1040), Mr. Justice Jaggard, speaking for the Court said:

“The second group of assignments of error concerns the alleged error of the trial court in



receiving the photographs of the rear of the premises in evidence, showing, *inter alia*, a stairway from the second floor to the ground. The basis of the objection is that the reception simply served to emphasize in the minds of the jury the gauzy suggestion of robbery as a motive for the unproved and otherwise unimaginable murder, by showing a possible mode of escape for the murderers from the premises. It is obvious that any testimony showing the condition of the premises and of means of access to and egress from the place where the deceased died was relevant."

And the monographic note to Metropolitan Life Insurance Company vs. De Vault (17 American and English Annotated Cases, 35), is to the same effect.

---

## V

In alleged error numbered VII, complaint is made that the testimony of Charles P. Ferrel given at the inquisition upon the body of the insured was used upon the trial of this case to impeach said witness. It appears that the testimony taken before the coroner was stenographically reported, under the direction and certificate of the coroner, and by said official filed in the office of the County Clerk of Washoe County, Nevada, pursuant to Section 7550 of the Revised Laws of Nevada, which provides that

“The testimony at such inquest shall be reduced to writing by the justice of the peace, acting as coroner, or as he may direct, and by him, without delay, filed in the office of the Clerk of the District Court of the County.”

This statute was adopted by the Nevada Legislature in 1912; it was copied, practically verbatim, from Section 1515 of the Penal Code of California, which provides:

“The testimony of the witnesses examined before the coroner’s jury must be reduced to writing by the coroner or under his direction, and forthwith filed by him, with the inquisition, and all recognizances taken by him, in the office of the County Clerk.”

And at the time of its adoption in Nevada, this California statute had been construed as follows:

“Testimony of witnesses at coroner’s inquest taken in writing, and returned to District Court, was properly taken and preserved so as to render it admissible in evidence in prosecution for murder of person on whom inquest was held for purpose of impeachment and conviction, after proper foundation had been laid. *People vs. Devine*, 44 Cal., 452, 459; *People vs. Lambert*, 170 Cal., 170; 50 Pac. Rep., 307.”

Kerr’s Cyclopedia Codes of California, volume 4, page 1364 and note.

In **O'Brien vs. Trousdale**, decided by the Supreme Court of Nevada, October 11, 1917 (165 Pacific Reporter, page.....), Mr. Justice Coleman, speaking for the court, said:

“It would seem that an additional reason exists for this court to adopt the view of the California Court, and that is that both our constitutional and statutory provisions relative to the writ of prohibition were taken from California and our statutory provision was enacted sometime after the decisions in California cases were rendered. **In the light of this fact, I think we must assume that our legislature intended to adopt the California statute as construed by the highest court of that state.**”

It seems manifest that the purpose of the legislature of Nevada in adopting Section 7550 of the Revised Laws in 1912 was to protect interested parties from the methods which seem to characterize Plaintiff in Error in this case. That variant statements made before a coroner's jury, properly preserved, may be used upon the subsequent trial of an action growing out of the inquisition upon the body, to contradict, impeach, or even convict of murder is a matter of Horn Book knowledge. In Encyclopedia of Evidence, under the title Impeachment of Witnesses, the following is found:

“Any statement of a witness variant from the statements of his that are given in evidence on

the trial, may ordinarily be put in evidence to impeach him by a person entitled to do so, on the conditions hereinafter set forth. \* \* \* The form and occasion of a witness' variant statements do not ordinarily affect their admissibility. Thus statements made by a witness when testifying on a former trial of the same action, or an altogether different proceeding, as an examining trial, a coroner's inquest, an inquiry before a grand jury, or an examination on proceedings supplementary to execution. The fact that the former proceeding was between different parties from the present does not affect the admissibility of the witness' variant statements given therein."

7 Encyclopedia of Evidence, 54, 57.

So, the statement of Counsel for Plaintiff in Error that "There is no statute providing that such testimony taken before a coroner shall be evidence in any proceeding of any nature or kind whatsoever" is not really entitled to much credence.

Nor is this all!

The record shows that the transcript of proceedings at the inquisition upon the body of the insured was used by both parties at the trial of this action, and without objection.

Record, pages 114 to 123, inclusive.

Nor was there any objection to the use of such



transcript on the cross-examination of the Witness Ferrel, as the following excerpt from the Record demonstrates:

“Mr. KEPNER: (Q.) Did you testify at the coroner’s inquest in Reno on the occasion when you say you delivered this gun to Mr. Unsworth?

“A. I did.

“Q. And you were asked about this gun at that time?

“A. I was.

“Q. I will get you to state whether you were asked this question by the District Attorney:

‘Q. Did you take the gun? To which you answered, ‘Yes, sir, I picked the gun up?’

“A. I did.

“Q. Then you produced the gun; and then you were asked this question, referring to this same pistol, ‘Is this in the same condition as it was?’ to which you answered, ‘No, I removed the shell from the chamber, and there are nine shells in the magazine.’

“A. Well, you are getting two questions together.

“Q. The question and your answer: The question is: ‘Is this in the same condition as it was?’ to which you answered, ‘No, I removed

the shell from the chamber, and there are nine shells in the magazine.' Did you so testify?

"A. It is compounded in two questions.

"The COURT: No, he is reading to you what occurred at the coroner's inquest. He is simply asking you if you gave that answer at the coroner's inquest. Read it to him again.

"Mr. KEPNER (Reading): 'Is this in the same condition as it was? A. No, I removed the shell from the chamber, and there are nine shells in the magazine.'

"Q. Did you so testify?

"A. **I made the answer to two questions."**

The record, therefore, does not sustain the statement in the alleged error, numbered VII, "said witness having previously testified \* \* \* that he did not give the testimony attributed to him;" on the contrary, the witness expressly admitted giving the testimony referred to. Whether he gave it in response to one question or to two questions is beside the point. Moreover, the Record (see pages 165, 166, 167) shows no objection to the use of this transcript on cross-examination.

Attention is now invited to the following:

"Mr. KEPNER: If your Honor please, I offer in evidence lines 15 to 28 inclusive, page 7, of the

duly authenticated transcript of proceedings entitled 'In the matter of the Inquisition upon the body of William C. Neasham, Deceased,' which, under the Statute, was filed in the office of the Clerk of the Second Judicial Court of the State of Nevada, in and for the County of Washoe, and by him duly certified as being a true and correct copy of that transcript; the matter referred to being a portion of the testimony of Charles P. Ferrel, given at the inquest." (Objected to as incompetent.)

"The COURT: This is simply for the purpose of impeachment, I suppose?

"Mr. KEPNER: That is all.

"The COURT: You may read that part that relates to the testimony you offer; it is only those parts you asked him about, and it is purely for impeachment.

"GENTLEMEN OF THE JURY: You will bear in mind, if I should neglect to state to you, when I come to charge you, that this evidence is not introduced as being the truth of what may have been there represented, but simply as bearing upon the question whether the witness under examination has at some other time testified differently from what he testified here; that is the only purpose; it is for the purpose as we term it in law, of impeachment; in other words,

to lay before a jury so that they may determine how far a witness is to be believed, because that is their province.

“Mr. HAWKINS: Your Honor overrules the objection?”

“The COURT: Yes.

“Mr. HAWKINS: I desire an exception.

“Mr. KEPNER: I read the portion of the testimony of Charles P. Ferrel appearing on page 7 of the transcript, beginning with line 15 (Reads:) ‘Q. By Mr. Lunsford: Did you take the gun? A. Yes, sir, I picked the gun up. Q. Is it here now? A. Yes, sir, this is the gun. Q. Is this in the same condition as it was? A. No, I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger. I took the shell out of the chamber, and there is nine in the magazine. Q. You have the empty cartridge now? A. Yes.’

“Mr. KEPNER: That is the portion which I read to the witness, your Honor.”

Record, page 252.

Now when the jury returned into Court and asked to have certain testimony read, what was it



which was in fact re-read to the jury? Page 302 of the printed record shows, beyond any question that it was the cross-examination of the witness Charles P. Ferrel, appearing on pages 165, 166, which was re-read to the jury, not page 252 as the Assignment of error and argument of Counsel thereunder would apparently imply.

So, Plaintiff in Error is mistaken in asserting in this alleged error (No. VII) that "there is no statute authorizing the use of such testimony"; and is unfair in stating the manner in which the testimony referred to was used. No possible error could have resulted under the admonition of the Court given to the jury at the time the testimony was introduced.

Record, pages 251, 252.

The assertion of Counsel to the contrary, notwithstanding, it seems very clear that the testimony was competent for the purposes of impeachment under Section 7550 of the Revised Laws of Nevada, as well as under the general rules of evidence on the subject of impeachment of witnesses.

---

## VI

Assignment of Error No. XI challenges that portion of the instructions of the Court to the jury which relates to the question of accident. It contains the following statement of the pleadings:

“In that it appears from plaintiff’s complaint, plaintiff’s reply and defendant’s amended answer that the insured came to his death from a gunshot wound—the defendant alleging in its amended answer that the insured came to his death as the RESULT OF A SELF-inflicted gunshot wound, while plaintiff in her reply alleges that the insured ‘came to his death on the 27th day of February, 1915, from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff;’ the issue, and only issue, of fact being whether or not the insured destroyed himself by gunshot wound as maintained by the defendant, or whether the insured came to his death from a gunshot wound inflicted upon him at the hands of some person or persons other than insured, as maintained by plaintiff; there was no issue of accident, mischance or grounds under the pleadings for the jury to speculate or theorize and the charge to the jury above set forth, permitted the jury to find for the plaintiff upon a theory of the case which was not in issue as made by the pleadings.”

Record, page 66.

The assignment is not based upon correct premises; the statement, as shown by the foregoing excerpt, omits a very important averment in plaintiff’s replication; and, if it be true that “the greatest falsehood is that which contains the largest

element of truth," then this assignment is unfair and misleading. The omitted paragraph of the Reply is in the following language:

"II. Plaintiff denies that either during the first insurance year, or either on the 27th day of February, 1915, or at any other time, said William C. Neasham, either destroyed himself, or either then or there died as the result of a self-inflicted gunshot wound, and in this behalf plaintiff alleges that her husband, William C. Neasham, the insured named in said contract or policy numbered 4707986 came to his death on February 27th, 1915, **at the hands of some person or persons unknown to plaintiff.**"

Record, page 14.

This is an allegation of ultimate facts broad enough to admit evidence of any character of injury, whether the instrumentality were a bludgeon, knife, bull-dog pistol, or other weapon, and therefore broad enough to include the theory of accidental, that is, unintentional injury. Doubtless, Plaintiff in Error at the proper time and place, might have required a more specific allegation but no such effort was ever made. Moreover, from the opening statement of counsel for the beneficiary (Defendant in Error) in the Court below, the following excerpt is made:

"Mr. KEPNER: If your Honor please, the

position I take is, in order to maintain and establish the case, is proof of the facts which I have outlined.

"The COURT: Well, perhaps you are right about that. You see, it is not admitted that the deceased died, so your evidence will have to show his death, and that will involve showing the means by which he died.

"Mr. KEPNER: Showing that he died?

"The COURT: Yes.

"Mr. KEPNER: I think, if your Honor please, we are anticipating just a little, perhaps. Under the terms of the policy, death is the only thing we have to prove; and we will prove death. I might state, in order that the jury may understand the form that this controversy will take, that the defendant, as I understand it, will contend that the insured died by his own hand, or by his own act; the plaintiff on her part, will contend as to that point that **the insured came to his death at the hands of some person or persons unknown—some person or persons other than the insured.**"

Record, page 75.

And at no time was the cause of death limited by the beneficiary (Defendant in Error) to a gunshot wound. The record shows no such limitation. Whether the misstatement of the pleadings in the



assignment referred to is by accident or design is not for Counsel to determine.

### THE THEORY OF ACCIDENT WAS NOT ELIMINATED:

The presumption is always against crime. Neither homicide nor suicide can be presumed. "The act of suicide is not only unnatural, but is highly immoral and criminal. The presumption of law is against it; so is the presumption of fact," (O'Rear, J., in *Aetna Life Insurance Company vs. Milward*, *Supra*.) The presumption is likewise against murder, or the intentional taking of the life of another. Accordingly, if the evidence be such as to warrant the inference either of suicide, murder or accident, the presumption is in favor of the latter (*Starr vs. Insurance Company*, 4 L. R. A., new series, 636); whereas, if the circumstances are consistent with either suicide or homicide, the presumption that death was due to accident is conclusive (*Jenkin vs. Pacific Mutual Life Insurance Company*, *supra*); in such case, the question must be left to the jury to determine as between those possible theories (*Aetna Life Insurance Company vs. Milward*, 4 American and English Annotated Cases 1092.) In other words the burden rested upon the Insurance Company (Plaintiff in Error) to exclude with reasonable certainty every reasonable theory as to the cause of death, except suicide, before a verdict as to that cause would be justified; and (whilst the

authorities cited and discussed in the II division of this Brief and Argument deal largely with the presumption against suicide, they are understood as forming a part of the argument at this point), there is another line of cases holding that the theory of accident was not eliminated, even where it had been made clearly apparent that the insured shot himself, and the State and Federal Courts have declined to interfere with the verdict of the jury. A few of those decisions will now be briefly reviewed:

In **Home Benefit Association vs. Sargent** (142 United States, 691), the following sinister facts and circumstances were unsuccessfully urged as a reason for reversal of the judgment:

“The facts in this case are thus stated in the charge of the Court to the jury, and there was no exception to such statement: ‘It appears to be undisputed that Edward F. Hall had lived about twenty years of his life in San Francisco. He frequently—habitually, perhaps—carried a pistol. He sometimes, during his life, kept a pistol under his pillow. He was a man of genial, sanguine temperament, hopeful, making plans as to the future, proud of his only son. But it also appears that for a long time he had been suffering from severe headache—to such an extent that it created depression so strong, at times, that the doctor describes it as melancholia. It appears that on the evening prior to

his death he was with a party of friends at the residence of Mr. Robinson, and there in the presence of two or three witnesses complained of suffering intense pain in his head, frequently placing his hands to his head and complaining of the severe pain which he suffered. The pecuniary circumstances of Hall have not been disclosed here, further than the evidence as to borrowing money of his sister. It is proof that he had a wife and son,—his son in college. But it is also proper that I should call your attention to the fact that at the moment of his death his wife was seriously ill—in a distant city. Upon the morning of the 19th of October, 1886, at 139 East 21st Street, in this city, and between 7 and 7:30 o'clock of that morning, Edward F. Hall was found in the back-hall bedroom of the fourth story, with a severe wound in his right temple. The wound was so severe that it caused a comminuted fracture of the frontal bone and fractures radiating up and down and backwards from the hole in the right temple, sufficient, unquestionably, to produce his death. He was found lying upon his bed with the clothes drawn up under the armpits, his limbs relaxed, no evidence of any struggle having taken place, and near his right hand, within a few inches or very near it, was the pistol, probably, which has been shown in your presence, with three of the chambers discharged. There was also found upon his stand or desk a letter to his physician, in

substance stating that he had been suffering terribly with headache, that he had had it for several days, that it is growing worse and has become well-nigh unbearable."

In **Boynton vs. Equitable Life Assurance Society** (105 Louisiana, 202; 52 L. R. A., 687), the following pertinent observations appear:

"We are informed that he was an active and industrious man, kind and affectionate to his children, who, in return, felt the regard and affection due him. He was not annoyed by debt, or anything else which would have a tendency to embitter one's life. This suit proves that he had at least one brother in addition to his children, for whom he must have entertained regard. While, as a self-respecting man, he was doubtless greatly annoyed by the charges brought against two of his brothers that was not of itself enough to drive a man to extreme desperation. Sometime had elapsed since the charges had been brought against these two brothers, during which he did not refer to them as cause which was driving him to the commission of such an act as suicide. We are of the opinion that our decree is amply supported by the decisions in *Leman vs. Manhattan Life Insurance Company*, 46 La. Ann., 1189; 24 L. R. A., 589, 15 Southern Reporter 388, and in the case of *Denechaud vs. Trisconi*, 26 L. Ann. 404. The evidence



does not exclude the theory that the death was accidental."

In **Kornig vs. Western Life Indemnity Company** (102 Minn., 31, 112 Northwestern Reporter, 1039), the facts as stated by the Court were that:

"The deceased was a man of cheerful disposition, living happily with his family, a kind father and devoted to his children. He had been moderately successful in business, and immediately before his death was in possession of a considerable sum of money, amounting to several thousands of dollars. There was testimony to the effect that he had slept and lived at home, and got his meals at home, where he had all his things, including his clothing; that his wife had seen him on the day of his death and daily for sometime before; but it further appeared that from the first day of March up to the 12th day of April, the day of his death, he had had a room rented in a house in Minneapolis. There was evidence tending to show that on the day of his death he had had trouble with the woman of the house where he had the room, and that he had shot her; that she ran into the street for assistance and that thereupon the officers entered the premises and found deceased dead upon the floor."

As further stated by the Court:

"He was lying on his left side with his left

cheek on the floor, his left arm beneath the body, the legs bent at the knees and drawn up, and the right arm so that the hand was on the leg. Loosely gripped in the hand was the revolver, the muzzle of which projected between and below the legs, so that it was visible to one standing in the doorway. In the right side of the head was a bullet wound, about an inch and a-half back of the ear. The trend of the bullet was backward and downward. Two or three cartridges remained in the revolver which was of a 38 or 32 calibre. Two or three empty cartridge shells had been extracted from it. Only a small amount of money and some papers were found on the person of the deceased. No one was found in the building in anywise connected with the death of the insured. The testimony of the unfortunate woman who was shot consistently maintained that deceased shot her; but she did not say that she saw deceased shoot himself. She emphatically denied having maintained any illicit or improper relations with deceased. There was no testimony that she called for help. She did nothing to cause the apprehension of her assailant. Her narrative as to what occurred immediately preceding the shooting varied at times. More specifically, she told the dressmaker who occupied the first floor of the building that at the time she received the shot she was looking into a drawer in the dresser for a present of which he had told her, and that

while stooping over she received the shot. This she denied in her deposition."

Upon these facts the Supreme Court of Minnesota said:

"The defendant insists that the testimony demonstrated that this was a case of suicide—pure and simple. The law on this subject is well settled. There is little controversy as to its formula and a singular unanimity in its application. Many cases have been cited and analyzed by both counsel. Their discussion here would serve no useful purpose. \* \* \* That insurance companies rarely succeed in sustaining this defense is, in its proper sense, no criticism upon the law or the rules laid down by the courts. The difficulty is inherent in the subject-matter. Men do not ordinarily commit suicide, and when they do they seek conditions of secrecy. Proof of death by suicide is naturally hard to be had. In *Lindahl vs. Supreme Court, I. O. F. (Minn.)*, 110 N. W., 358, Mr. Justice Elliott has thus summarized the rules generally accepted on this subject: Where the defense of suicide is asserted against an action by a beneficiary on an insurance policy '(a) The burden of proving that the deceased committed suicide is upon the defendant; (b) The presumption is against suicide; (c) If the known facts are consistent with the theory of natural or accidental death, the presumption which the law

raises from the ordinary motives and principles of human conduct requires a finding against suicide; (d) When circumstantial evidence is relied on, the defendant must establish facts which preclude any reasonable hypothesis of natural or accidental death.' It is the defendant who must, when circumstantial evidence is relied on, establish such facts as preclude the hypothesis of natural, violent, or accidental death. The burden of proof does not rest on the plaintiff to establish such facts as demonstrate or justify the theory of death otherwise than by the hand of the insured himself, in order that the jury may find against death by suicide. It is not material that 'there was not enough evidence to say that murder was done.' O'Rear, J., in *Aetna Life Insurance Company vs. Milward*, 82 S. W., 364, 365 (and see cases collected at page 366), 118 Ky., 716; 68 L. R. A., 285. Moreover, where the cause of death is in doubt, there is a presumption of law against death by suicide. It is true that there is a corresponding presumption against death by crime. The result of the rule in such a case as this is, as has been well said by Cassoday, C. J., in *Rohlof vs. Aid Ass'n.* (Wis.), 109 N. W., 989, 991: 'Can it be said as matter of law that the inference or conclusions to be drawn from such facts are so clear and unambiguous that reasonable men, unaffected by bias or prejudice, would agree that the deceased intentionally shot himself?' It is to be noted that this



case was decided subsequently to *Agen vs. Met. Life Ins. Co.*, 105 Wis., 215, 80 N. W., 1020, 76 Am. St. Reps., 905, to which defendant refers us."

In **Fidelity & Casualty Company vs. Love** (111 Federal Reporter, 773), the facts are sufficiently indicated in the discussion of their effect by Mr. Circuit Judge Selby, speaking for the Circuit Court of Appeals, sustaining a judgment for the beneficiary, where he says:

"Whether Noah committed suicide or not was a question of fact. He was found dead on his bed, only partially dressed, with his feet on the floor, with a pistol loosely grasped in his hand. There was some evidence as to the range of the ball that had passed through his head, which tended, or at least was offered, to show that he did not fire the fatal shot. But if it be conceded, as the weight of the evidence seemed to show almost, if not quite conclusively, that the deceased held the pistol that fired the shot, it is not absolutely certain that he committed suicide. No one saw the shooting. Whether it was accidental or intentional was a matter of surmise. There is evidence tending to show that he was despondent and probably tired of life, and evidence tending to the contrary. There is conflict even as to the wound and its location. The evidence is not entirely inconsistent with the theory of accidental killing. The evidence is presented

in detail and at length in the record, and it would serve no useful purpose to state it. In a case very much like this one in many of its features, the Supreme Court has recently held that the trial court did not err in submitting the question of suicide to the jury. *Supreme Lodge vs. Beck*, 181 U. S., 49."

In *National Union vs. Fitzpatrick* (133 Federal Reporter, 694), the circumstances surrounding the death of the insured, as stated by the Court, were far more sinister and indictive of self-destruction than in the instant case, yet they were unsuccessfully urged against the judgment of the beneficiary. The facts as stated by the Court, were:

"David Fitzpatrick, the assured, was found dead in one of the rooms of the Commercial and Industrial Association, a social organization in the city of Montgomery, between 5 and 6 o'clock in the afternoon of December 3, 1900. The deceased, Fitzpatrick, went into the rooms of the Commercial and Industrial Association between 11 and 1 o'clock, probably near noon. Soon after going to the rooms of the Association, he appears to have gone into what was called the committee room—a small room used for committee meetings, in which there was a telephone. The first thing Fitzpatrick did after going into the room was to use the telephone. After this he was seen by an employee of the association several times, sitting in a chair, with his feet in an-

other chair, apparently asleep. Between the hours of 5 and 6 o'clock, Vickers, the employee who had frequently seen deceased sitting in that position during the afternoon, informed Gilbert, the secretary of the association, that Fitzpatrick had been in that attitude a long time; and thereupon Gilbert opened the door of the Committee-room, which was closed, but unlocked, and found that Fitzpatrick was dead. The hands of the deceased were lying in his lap. They were not folded, but in his right hand was a pistol. There was an overcoat over his lap. There was a wound in the left breast of the deceased. He had apparently been dead several hours."

In addition to these sinister circumstances, the record further discloses that the insured was in financial difficulty, being short in his accounts, he was threatened with arrest and prosecution for embezzlement of funds from the Standard Oil Company, a corporation in whose employ he had been. Speaking of these circumstances, the Court said:

"The main question here is whether, under the evidence in this case, it was the duty of the Court to have directed a verdict in favor of defendant. Did the evidence require such a verdict and no other, or was the case such that the Court was justified in submitting it to the jury for determination? \* \* \* The plaintiff having shown the death of Fitzpatrick, and the defendant

claiming that the cause of death was one excepted from the operation of the policy or benefit certificate, it was incumbent on it to show, to the reasonable satisfaction of the jury, this fact.

\* \* \* Under the evidence in this case, 'It is impossible to say that, beyond dispute' Fitzpatrick committed suicide. If it were necessary to do so, much could be cited from the evidence in favor of the fact that Fitzpatrick did not intentionally kill himself. He was a young man, apparently in good health, happily married. His relations with his wife and with her family, they all living together, appear to have been excellent. However this may be, and in any view of the facts, they were not such, in our opinion, as to require the Court to direct a verdict in favor of the defendant."

In **Supreme Lodge vs. Beck** (181 U. S., 49), the insurance company, also, resisted payment of its contract on the plea of suicide. The insured was killed by the discharge of a shotgun at the time held in his hands; the coroner's jury found that he had died "by shooting himself in the head with a double-barreled shotgun, with the purpose and intent of committing suicide"; and consequently the case was strenuously contested. The circumstances surrounding the death were as a matter of first impression extremely unfavorable to the beneficiary and yet they were unsuccessfully urged against the judgment in favor of the beneficiary.



Mr. Justice Brewer, writing the opinion for the Supreme Court showing that the evidence was not inconsistent with the theory of accident, thus summarized the situation:

“Whether the deceased committed suicide was a question of fact, and a jury is the proper trier of such questions. It is not absolutely certain that the insured committed suicide. The following are the facts, at least, from the testimony, the jury was warranted in finding them to be the facts: The deceased and his wife had been married some six years. They had one child, a little girl, of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic who had worked in the family for two or three years, but had left a year and four months before his death, that when once she called his attention to the fact that he was drinking heavily his reply was that a man that had as much trouble as he had, the sooner the end came the better, and a similar remark at another time, that such a man ‘would be better off dead than living.’ Two days before his death his wife left him and went to a neighbor’s. He tried to persuade her to return, but she refused to do so while he was drinking.

There were two guns in his house, one a single-barrel shotgun, belonging to his wife, and one a double-barrel shotgun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying that he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who soon came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hackdriver, who had brought the policeman, called out that the deceased had gone into the backyard and into the closet, and after a minute or so heard him step outside and immediately the gun was discharged, and on examination he was found with the upper part of his head shot off. It was so dark no one saw the circumstances of the shooting. Whether it was accidental or intentional is a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been

had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a drunken man, stumbled and fell against it, is a matter of conjecture. There was a dispute as to whether, in view of the length of the gun and the shortness of his arm, he could have reached the trigger without the aid of a pencil or piece of wood, no trace of which was found, or indeed looked for. Under these circumstances, it is impossible to say that beyond dispute he committed suicide. The discharge of the gun may as well have happened from the careless conduct of a drunken man as from an intentional act. At any rate the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the court of appeals, we are not justified in disturbing it."

**In O'Conner vs. Modern Woodmen of America** (Minn.), 25 L. R. A., new series 1244, the facts and circumstances surrounding the death of the insured were such as to admit the theory of suicide; but, it might have been an accident. The following excerpt is taken from page 1248 of the selected reporter:

"Self-destruction also rendered the benefit certificate void and of no effect, and it is urged by defendant that the only conclusion to be drawn from the evidence and the circumstances

surrounding the death of the insured is that he committed suicide. A careful consideration of the record leads to the conclusion that the learned trial court properly submitted this question to the jury. At the time the insured became a member of the society he was, and for a considerable time prior thereto had been, a section foreman on one of the railroads leading out of Duluth. His family consisted of himself, wife, and three children. He was thirty-six years of age, and had been married about twelve years, and so far as the record discloses his family relations were uniformly pleasant. He was of a jovial disposition, industrious, and, with the assistance of his wife, had accumulated in the neighborhood of a thousand dollars, which was on deposit to his credit in Duluth banks. A day or two before his death he was discharged from his position as section foreman by the roadmaster, because of dissatisfaction with his work; but the evidence is reasonably clear that this did not disturb him, and he proceeded about his affairs as though nothing of the kind had taken place. There is some intimation in the evidence that he was not anxious to retain that position, and that he had been looking for a situation elsewhere. On the day of his death he went to Duluth in the morning, where he made some purchases for his wife and children, returning home in the afternoon or evening in his usual spirits.



A large party was had at his residence on that evening, at which a number of neighbors appeared, and music and dancing were indulged in until about eleven o'clock at night. He planned with one of his friends to go hunting the next day, and before retiring for the night he arranged his materials, and made all plans for leaving the house at 3 o'clock in the morning. He owned a rifle and also a revolver. The latter was kept upon the clock shelf in his sleeping room. With all his plans made, and the party dispersed, he retired in the room with his wife. His wife went to sleep, but later on was awakened by the discharge of the revolver in her room, and, arousing herself, found that her husband had been shot in the forehead and was dead. When discovered he was lying upon his back; one hand extending out over the edge of the bed over a slop jar, into which the revolver had fallen. Whether he had clothed himself ready to start on the hunting trip is not disclosed; nor does it appear whether he took the revolver to bed with him, or when he got hold of the firearm. It may have been under the pillow during the night. We are not advised by the evidence. At any rate, it is clear that, either through accident or design, he shot himself. When the coroner arrived the next day, the wife said to him that in her opinion her husband had shot himself, and she later made the same statement to others. No living person witnessed the shooting, and whether it

was accidental or purposely done by deceased can only be determined from the facts and circumstances disclosed by the record."

Commenting on these facts, the Court said:

"The evidence tending to show that the shooting was the deliberate act of deceased is not so conclusive as to justify interference with the verdict. The presumption is against suicide, and the burden was upon defendant to prove the contrary by a fair preponderance of evidence. And, though some evidence points to self-destruction, other items clearly negative that theory. We discover in the record no motive, no cause which might have prompted insured to deliberately take his own life. He had no family trouble no despondency or brooding over other trouble, and was not in want or necessitous circumstances. His drinking had not been of such a nature as to impair his health or faculties, and from the record no sufficient reason can be assigned in support of defendant's contention that the jury ought to have found that he deliberately took his own life. The opinion of his wife that such was the fact was clearly not controlling. She was greatly disturbed at the time of the shooting, and for several days subsequent to the tragedy, and her opinion is of no greater force than that of any other person, based upon the facts here before the Court. We are not advised that any other facts than those

disclosed by the record were made the basis of her opinion. The question was for the jury."

In **Metropolitan Life Insurance Company vs. De Vault** (17 American and English Annotated Cases, 27 at page 31), the following is found:

"The defense of suicide, to avail, must show that every hypothesis of accidental death is excluded by the evidence. \* \* \* The burden of proving the defense of suicide was on the defendant. \* \* \* Where the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident. \* \* \* **Standard Life Insurance Company vs. Thornton**, 100 Fed., 582. In the case last cited it is said: 'Accidental death will be presumed, and this presumption must be overcome by the proof of facts which exclude every hypothesis of death except by suicide.'"

There are other interesting cases to the same effect that might be referred to (17 American and English Annotated Cases, 32; **Modern Woodmen vs. Kincheloe**, 175 Indiana, 563; 28 American and English Annotated Cases, 1259, 1262); but the decisions in any manner militating against the authorities cited in this Brief are as "scarce as hen's teeth." The case of **Agen vs. Metropolitan Life Insurance Company** (105 Wisconsin, 217; 80 Northwestern Reporter, 1020, 1022), cited by the Plain-

tiff in Error, is hardly authoritative. There is a strong dissenting opinion, written by Mr. Justice Winslow and concurred in by one other member of the Court, and from that dissenting opinion, the following excerpt is taken:

"I respectfully dissent in this case, because I think the circumstances shown by the evidence are fully as consistent with the theory of accidental shooting as with the theory of suicide, and, if such be the case, the law is well settled that the legal presumption is against suicide and must prevail."

(See, 80 Northwestern Reporter, page 1023.)

So far as the research of Counsel discloses this is the only case on the subject, where a Supreme Court has violated the rule:

"If reasonable men, in weighing the evidence, might honestly differ in their conclusions as to whether decedent committed suicide, the verdict should stand."

(28 American and English Annotated Cases, 1260).

And, it is some satisfaction to call attention to the fact that whatever value the case may ever have been entitled to, it has been greatly weakened by the subsequent decisions of the supreme court of that state; for instance, in the case of **Rohlof vs. Aid Association** (109 Northwestern Reporter, 989,



991), the Supreme Court of Wisconsin, in sustaining a judgment for the beneficiary, used the following language:

“Can it be said, as a matter of law, that the inferences or conclusions to be drawn from such facts and circumstances are so clear and unambiguous that reasonable men, unaffected by bias or prejudice, would agree that deceased intentionally shot himself? If that is not so, the verdict of the jury is sustained by the evidence, and the trial court properly refused to set it aside and grant a new trial.”

Enough has been said to justify the assertion that where the circumstances leave it doubtful whether the insured met his death by his own act or by the act of another, the presumption in favor of death by accidental means is controlling; and according to the great weight of authority the presumption in favor of accident is conclusive where it is clear that the act resulting in death was by the insured himself, and there is nothing from which it can be determined whether the act producing death was accidental or intentional. The presumption is that it was accidental. (*Grand Lodge vs. Bannister*, 80 Arkansas, 195; 96 Southwestern Reporter, 742.) In other words, where the evidence confines the inquiry to the conduct of the insured himself, it is always a question of fact whether the act resulting in death was by accident or design.

Illuminated by the reasoning of the reported adjudications on this precise point, it seems clearly manifest that the charge of the District Court, submitting the question of accident to the jury, was not only squarely within the issues made by the pleadings, but the charge, taken as a whole, was as favorable to the defendant Company as it had any reason to expect. The jury was plainly told that—

“If he took his own life, whether sane or insane, the verdict must be for the defendant.”

Record, page 291.

---

## VII

Assignments of Error, numbered, respectively, II, VIII, IX, X, XII, XIII and XIV are all based upon the contention, more or less clearly expressed that there is no evidence to sustain the verdict of the jury. More specifically, the II and VIII assignments are based upon the refusal of the Court, at the conclusion of plaintiff's case in chief and at the conclusion of all of the evidence in the case, to entertain the alternative motion of Plaintiff in Error for a non-suit or a directed verdict; the IX and X assignments upon the refusal of the Court to give the peremptory instructions in favor of the Insurance Company, which do not appear, however, to have been made the subject of an exception (Record, page 288); the XII assignment is predi-

cated on the proposition that the "verdict of the jury is not sustained by the evidence;" the XIII, that "there is no testimony tending to sustain the verdict of the jury;" whilst the XIV complains that "the verdict of the jury was contrary to the law."

Record, pages 52, 59, 60, 61, 66, 67 and 68.

The decisions are uniform that questions of fact will not be reviewed by the Circuit Court of Appeals on writ of error; for example, in **Truckee River General Electric Company vs. Benner** (211 Federal Reporter, 79, 81), your Honors used this language:

"The facts in the case, as well as the argument of Counsel, suggest the injustice of permitting the recovery of \$7,000 in favor of three able-bodied young men, capable of supporting themselves, and one married sister who is not shown to be in need, for the death of a brother nearly 19 years of age, who was under no obligation to contribute to their support, and probably would soon have married and ceased his contributions. But this Court has nothing to do with the question whether the damages were excessive. The jury having fixed the measure of damages, and the court below having refused to set aside their verdict, the only questions for our consideration are whether or not there was error in the admission or exclusion of evidence

or in the giving or denying of instructions to the jury."

Notwithstanding this salutary rule, it is doubtless true that if there were, in fact, no evidence to sustain the verdict of the jury, a question of law might be submitted under the several assignments of error referred to, and out of an abundance of caution the more salient features of the evidence, as disclosed by the Record, will be briefly reviewed. The statement of the evidence contained in the opinion of the learned trial Judge, denying the motion of Plaintiff in Error for a new trial, is adopted, with citations of the pages of the printed Record at appropriate points as the following

### STATEMENT OF THE CASE:

"On the morning of his death, the deceased was observed between eight-thirty and nine o'clock walking through town and out along the track of the Southern Pacific Company towards Sparks, and about an hour later was found in a moribund condition lying in a cut or depression by the side of the track some distance east of Reno. He was apparently unconscious when found, but was still breathing in a heavy or stertorous manner. The coroner and sheriff reached the scene sometime after ten o'clock, and on their arrival found him dead. The place where the body lay was locally referred to as the 'Gravel Pit' or 'Oil Pit', a deep sunken way or



cut along the railroad track between Reno and Sparks, adjoining the grounds of the Nevada State Insane Asylum, with a wagon road running through it to facilitate loading and hauling oil, from a tank situated on the Asylum ground, adjoining the railroad right of way.

RECORD, pages 150, 231; EXHIBITS "D", "E", "F", page 314.

"The body was lying on its right side with the right arm partly extended at an angle from the body, and the left lying across the abdomen." (Record, pages 171, 172.) "A pistol—a Savage automatic of .32 caliber—which the evidence tended to identify as one purchased by the deceased the day before, was lying some few inches from the right hand, and an empty cartridge shell of .32 caliber was found on the ground near the body. The head was lying up the slope of the cut with the feet extending into or near the wagon track." (Record, pages 95, 96.) "The clothing was not in disorder, except that the hat had fallen off. There was no evidence at the point where the body lay of any disturbance of the ground to indicate a struggle. The deceased's watch, a small sum in coin, and some other small articles were found on his person. Blood was oozing from the mouth and nostrils, and a fresh bloodstain was found on the right arm of the coat at the elbow. (Record, page 181, and the coat EXHIBIT "C". "Investigation disclos-

ed a wound in the back part of the throat or mouth a little to the right of the median line, leading through the soft palate and into the brain cavity, of a size sufficiently large to enable the insertion of the middle finger of a man's hand, and so located as not to be visible except by opening the mouth and depressing the tongue; fractured bone could be felt in the wound, and a stellar-shaped fracture of the skull was found on the back part of the head just above and to the right of the occipital protuberance, with a small fracture of skull-bone pushed out beyond the regular contour of the skull, but no exit wound through the scalp,—the fracture being on a line a little upwards from the point of entrance of the wound in the throat.”

Record, pages 193, 194.

“While the autopsy was not such as to definitely disclose the producing cause of the wound, the opinion of the sheriff and doctors was that the wound was from a gunshot; there was no apparent injury to the lips, teeth or tongue, and the testimony of the physicians was to the effect that the wound could not, in their opinion, have been caused other than by the insertion of the weapon in the mouth without injuring the adjacent organs, unless inflicted while the deceased had his mouth open in the act of yawning or

retching, or crying out in agony; and that it was of a character to produce death." (See, Record, page 202.)

"In the first place, the evidence is wholly lacking in anything in deceased's situation tending to disclose motive for taking his own life. He was in what may be termed fairly easy financial circumstances. He was a rancher and stockman, owning a large ranch with stock and other personal property and having his home in Reno. His ranch was under mortgage for \$15,000, but the loan was not due for nearly a year and a-half, and the evidence tended without controversy to show that his ranch was worth at least twice the amount of the mortgage, while he had to his credit in the bank at the time of his death a balance of something over \$800; and nothing was shown to indicate that he was at any time to any extent disturbed over business affairs." (See, Record, pages 253, 256.)

"He was between forty-seven and forty-eight years of age, a large, strong, robust man, in good health, and of uniformly cheerful disposition; lived very happily with his wife and family, consisting of a number of children,—a perfect family, as testified by the minister of his church,—attended church frequently and a fraternal society of which he was a member." (See, Record, page 260.)

“The evidence disclosed that he had returned only two days before his death from a visit with his wife and other members of his family to the opening of the Panama-Pacific Exposition in San Francisco, where he had enjoyed himself and appeared very cheerful and happy throughout the trip. He had been in his bank the day before his death, and the president testified that he appeared perfectly normal in manner, while on the morning of his death he was up and about the house as usual with his family, dressed the baby, helped his wife in the kitchen, and was in his usual cheerful mood at the breakfast table; and a friend who met and talked with him for several minutes on the street when he was on his way to the scene of his death testified that he had never appeared more cheerful or contented.” (See, Record, pages 241, 242, 254, 148, 224, 276 and 277.) “It appeared, moreover, that he did not seek or apply for the insurance involved, it having been taken out at the solicitation of an agent of the defendant; and there is no suggestion that at the time the policy was issued, or at any other time, the idea of self-destruction was even remotely entertained. So much for the question of motive.” (See, Record, page 256).

As in murder and other like crimes, so also in this character of action, the courts have always attached great importance to the absence of ade-



quate motive, where the effort has been to establish the theory of suicide purely from circumstances. Thus in **Modern Woodmen vs. Kozak** (63 Nebraska, 153, 88 Northwestern Reporter, 248), the Supreme Court of Nebraska, discussing the absence of motive, used the following language:

“But there is another fact of which the jury could not have been ignorant, namely, the absence of all evidence in the record tending to show motive inciting to self-destruction. Self-murder is abhorrent to the mind, and common observation teaches that normal men are not driven to the desperation of suicide without some exciting cause of more than ordinary magnitude.”

In **O’Conner vs. Modern Woodmen** (25 L. R. A., new series, 1244), the Supreme Court of Minnesota used this language:

“We discover in the record no motive, no cause, which might have prompted insured to deliberately take his own life. He had no family trouble, no despondency or brooding over other trouble, and was not in want or necessitous financial circumstances.”

And, the absence of motive is emphasized by the circumstances surrounding the insured; for example, an inference that insured did not intentionally take his own life arises from the fact that he had a good home, or that he was married and lived

happily with his family (National Union vs. Fitzpatrick, *supra*); the inference against suicide is strengthened by proof that the insured was of good habits (Boynton vs. Equitable Life Assurance Society, *supra*); as, also, by proof that he was industrious and sober (Grand Lodge vs. Bannister, *supra*); as by proof that he was religiously inclined (Modern Woodmen vs. Craiger, 90 Northwestern, 84); whilst evidence of the affectionate relations of husband and wife, the number of children and his relations with them are circumstances from which an inference against suicide may be drawn (Supreme Lodge vs. Beck, *supra*). These circumstances and many more appearing from this Record all tend to negative the theory of suicide; they emphasize the absence of any adequate motive for self-destruction, and "common observation teaches that normal men are not driven to the desperation of suicide without some exciting cause of more than ordinary magnitude" (Aetna Life Insurance Company vs. Milward, *supra*).

Continuing, with his analysis of the evidence, the District Court said:

"The body of the deceased was first discovered by one Lalonde, a sheep shearer temporarily stopping at the time in Sparks. He testified in substance that he was walking on the railroad track and saw deceased lying in the cut and heard him breathing heavily; that thinking there was something wrong he called to two

other men whom he saw in the vicinity and they all went down to where deceased was lying or within a few feet of where he lay, saw the pistol near the body, and concluded that he had shot himself, went to a nearby point and telephoned to the sheriff, and when they returned to the place where the body lay life was extinct. These three men, Lalonde, Brown and Rudolph, afterwards testified at the inquest as to the fact of finding the body, but they had disappeared before the trial and could not be found or produced, and their testimony as taken before the coroner was read by consent. No definite effort, so far as appears, was made at the inquest to identify these men as to their permanent place of abode, their character, antecedents, or mode of life, nor as to how they came to be in the vicinity at the time. They testified that they were out walking and just happened to meet there. One of them testified that they heard no report of a gun." (See, Record, pages 114, 123.)

"The evidence tended to show that the ground where the body lay was sandy and damp, and of a character to clearly show the impression of footprints, and there were certain footprints testified to by the officers as having been found about the body. They differed somewhat, however, as to the result of their observations in this regard. The coroner testified that 'the only tracks were foot-prints of one person that led

to where the body lay'; that he saw no others. The sheriff testified: 'Arriving at the scene I found three tracks leading down to where the body was lying; one track leading to the spot, and two other tracks leading to within eight or ten feet of the spot. Those tracks turned and went back, making altogether five lines of tracks, three going and two returning. \* \* \*

I saw no tracks other than what I have mentioned.' The undertaker who accompanied the officers, stated: 'I observed a few tracks coming from the east toward the body. I didn't take much interest in that; I was interested in other matters.' " (See, Record, pages 99, 158, 159 and 173.) "No effort was made to identify the tracks or footprints testified to as leading up to the body as those of the deceased, nor was it clearly shown whether those particular tracks stopped at the point where the body lay or were retraced; moreover, the inquiry as to the character of the soil and evidence of tracks was directed generally to 'the ground where the body lay,' and the fact was not developed whether the condition of the wagon road running through the cut was such that footprints of one walking in the roadway could be readily discerned or followed.

"Ex-sheriff Burke, Superintendent of State Police at the time of the death, an experienced officer, testified to making an examination of the



place where the body was found, and its immediate surroundings on Sunday, the day after the death, for any indications of other persons having been in the vicinity; and he stated that at a point about 100 to 125 feet from where the body lay, just across the railroad track, he found tracks in the soft, sandy ground, 'and observed a place where someone had been lying down.' (See, Record, page 235.)

"There was a discrepancy in the evidence as to the condition of the pistol found by the body of the deceased and the number of unexploded shells it then contained. The shopkeeper who sold the weapon to deceased testified that when deceased bought the pistol he asked him how it worked and to load it; that he informed him that he had but nine cartridges on hand, while the weapon carried more, but deceased said that would be enough, and they were inserted in the magazine before he took the weapon away. There was produced in evidence at the trial the pistol with eight unexploded cartridges and one empty shell, and the sheriff testified in substance that when he picked the weapon up from the ground the hammer was back—that is, the gun in a position to shoot by pulling the trigger—with a shell in the chamber, the others in the magazine, and one empty shell lying on the ground; that he removed the magazine and the shell from the chamber, picked up the shell on

the ground, and turned them over, with the weapon, to the coroner, from whose custody they were produced. It was developed on his cross-examination that his testimony at the inquest, as reported in the certified transcript of the proceedings, differed from this in one or two significant respects. It there appeared that when he was there being examined about the condition and contents of the pistol when picked up, these questions were put and answered: 'Q. Is this in the same condition that it was? A. No, sir, I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition. A. It is in the same condition with the exception that the safety was on the trigger; I took the shell out of the chamber, and there are nine in the magazine.' (See, Record, pages 165, 166, 252.) "And it was shown in this connection that with the 'safety on the trigger' the hammer could not be drawn back or cocked or the weapon exploded; that in that condition the weapon was harmless." (See, Record, page 249.)

"As suggested, the autopsy was not carried to a point sufficient to disclose the character of the missile making the wound, if missile it was. The surgeon conducting it, as indicated from the evidence, assuming apparently that the wound was the result of a gunshot and was sufficient to cause death, made no further or more definite

examination as to the producing cause of the wound in the throat; the scalp was turned down sufficiently to disclose the nature of the fracture of the skull, but the brain cavity was not opened, nor, so far as appears, was a probe used to search for a bullet, the operator contenting himself with inserting his finger in the opening in the throat. Accordingly the evidence did not disclose whether there was a bullet in the brain, or, if there was, that it was of the same caliber as the empty shell found by the body. Moreover, there was apparently no effort made to ascertain whether the pistol, when picked up, bore any evidence of having recently been discharged, such as burnt powder or otherwise." (See, Record, pages 194, 203-206.) While the presence of dirt in the barrel of the pistol when picked up indicated the contrary. (Record, page 157.)

"One other circumstance remains to be noticed to which much significance is attached by the plaintiff. When the body of the deceased was brought home from the coroner's there was observed by members of the family on the forehead over the right eye, just at the line of the hair and partly covered by it, evidence of an injury variously referred to by the witnesses as 'a dent', 'a depression', or 'a scar,' which the evidence tended to show had never before been observed by the members of deceased's imme-

diates family or others acquainted with him, including his family physician, who had attended the family for 11 years. It was described by the different witnesses as being all the way from an inch and a quarter to two or more inches in length, and three-sixteenths to a quarter of an inch deep—of sufficient depth and length, as one or two expressed it, to partly lay the little finger in it—but with little, if any, discoloration; it was first observed by the undertaker at his undertaking rooms, who said he thought it was a scar and paid no particular attention to it, but he testified that it was not caused by moving the body or handling it after death. The family physician characterized it as a bruise or scar, apparently made with a blunt instrument, which it had taken considerable force to produce—sufficient to knock a man down and perhaps render him unconscious—but as to how recently it had been inflicted, he stated it was impossible definitely to say, for the reason that such a wound, if inflicted when death shortly ensues, does not take on the same appearance or characteristics as under other circumstances; that the blood, being stopped in its circulation, has not the same tendency to extravasate or cause discoloration, as on a living person, and particularly in an injury to the scalp where the capillaries are not profuse. There was no evidence tending more definitely to disclose when or how this injury was inflicted upon the deceased.”



(See, Record, pages 225, 238, 240, 244, 247, 263, 266, 267.)

“These are, in their material substance, the circumstances bearing upon the manner in which the deceased came to his death. Can it be justly said that, when considered as a whole, they point so inevitably and certainly to the conclusion of self-destruction that the jury as reasonable men were not justified in adopting a contrary view; and that their finding is so lacking in substantial support in the evidence that it is now the duty of the Court to set it aside? With a full appreciation of the responsibility, so strongly impressed by counsel as resting upon the Court, to supervise their verdict, and see, so far as lies within the proper exercise of its power, that it speaks the truth, I feel constrained to answer the inquiry in the negative.”

### **CIRCUMSTANCES MUST BE PROVED, NOT ASSUMED:**

The circumstances most strongly dwelt upon by Plaintiff in Error to support its theory of self-destruction are (1) the character of the wound in the throat or mouth; (2) the alleged purchase of the pistol found in close proximity to the body. But it is submitted with confidence that the circumstances relied on by Plaintiff in Error prove nothing more than death by violence.

For the purpose of the argument on this phase

of the case, the conflict in the testimony of the WITNESS FERREL, as to the condition of the pistol when picked up, is laid to one side; for, with the "Safety on the trigger" the insured certainly did not shoot himself; also, laying to one side, the fact that there was dirt in the barrel of the pistol, when picked up (see, Record, page 157), and giving the circumstances relied upon to support the theory of self-destruction their full value as evidence, what is proved? Plaintiff in Error assumes that the wound in the throat was caused by a gunshot. There is no direct evidence to support that assumption. It is a presumption or inference drawn from other circumstances in the case. No report or shot was heard; no ball or other missile was found in the wound; there was no point of exit! It is not only assumed that this wound was caused by a gunshot, but built upon that presumption is another, namely, that the wound in the throat was caused by a shot from the particular weapon found by the body. All of which is purely a matter of surmise, suspicion, speculation! Under the evidence, that wound may or may not have been produced by a gunshot; it may or may not have been caused by a knife; certain it is that there is no open or visible connection shown between the wound and the pistol. The wound was large enough to enable the insertion of the middle finger of a man's hand, the pistol carries a ball no larger than the ordinary lead pencil. "The fact that the bullet found in the head of the deceased was too small

to have been fired from the weapon found near the body is a circumstance not easily reconciled with the theory that he shot himself" (Modern Woodmen of America vs. Kozak, 63 Nebraska, 153, 88 Northwestern Reporter, 248.) Whilst in the instant case, no ball or other missile was found, and the producing cause of the wound in the throat is left by this Record utterly to conjecture, and here the case for Plaintiff in Error broke down. Counsel conceded this weakness in their case when, in order to show some possible connection between this wound and the instrumentality produced by them, they proceeded to call and examine Dr. S. K. Morrison, who testified to "a gun" but did not testify as to the particular weapon. (See, Record, page 208.)

The essential and all-important fact, namely, that the wound in the throat was caused by the particular pistol in evidence, is missing. It is entirely a matter of conjecture. There is no visible or open connection shown. The theory of suicide, broke down at the vital, pivotal point in the case. Starting with the theory of self-destruction, the defendant Company assumes that the insured shot himself, because they assume that he intended to destroy himself, because they assume that the wound in the throat was caused by the Savage automatic pistol found near the body; because they assume, in the face of dirt in the barrel, that the pistol had been recently discharged, because,

forsooth, they assume, through Doctor Morrison, that if a gun—not this particular pistol, but just a gun,—were held close against the body “a jagged, large, crater-like opening would be produced!” In the descriptive and wholly unrivaled phraseology of Distinguished Counsel, “It is a far shot!”

As stated by the District Court in the opinion denying the motion for a new trial:

“As suggested, the autopsy was not carried to a point sufficient to disclose the character of the missile making the wound—if missile it was. The surgeon conducting it, as indicated from his evidence, assuming apparently that the wound was the result of a gunshot and was sufficient to cause death, made no further or more definite examination as to the producing cause of the wound in the throat. The scalp was turned down sufficiently to disclose the nature of the fracture of the skull, but the brain cavity was not opened, nor, so far as appears, was a probe used to search for a bullet, the operator contenting himself with inserting his finger in the opening in the throat. Accordingly the evidence did not disclose whether there was a bullet in the brain, or, if there was, that it was of the same caliber as the empty shell found by the body. Moreover, there was apparently no effort made to ascertain whether the pistol, when picked up, bore any evidence of having been



recently discharged, such as burnt powder or otherwise."

Record, page 26.

That a presumption cannot be based upon a presumption, an assumption of fact drawn from another assumption of fact, or an inference of fact predicated upon another inference of fact, is a fundamental principle of logic and of law, which has become well-nigh axiomatic in its application.

In this connection, the following from 1 MOORE ON FACTS, 599, is pertinent:

"The circumstances must be proved, and not themselves be presumed. A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can be fairly or reasonably drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory."

In 14 Encyclopedia of Evidence, page 101, it is said, citing several authorities, that "A presumption cannot be based upon a presumption." And, in 3 Chamberlayne's Modern Law of Evidence, 1764, it is said: "In all cases the fact circumstantially relevant must be proved by direct evidence

unless admitted. It cannot itself be inferred from circumstantial evidence."

In **Evansville Metal Bed Company vs. Loge** (85 Northeastern Reporter, 979), the Supreme Court of Indiana, in discussing this salutary rule of evidence, used the following language:

"No one questions but what the facts necessary to make out a civil cause of action may be established as well by circumstantial evidence as they may be by direct proof, and the circumstances may be such in some cases as to contradict and overcome the direct and positive testimony of witnesses to the contrary. Circumstantial evidence consists in reasoning from the facts which they may be by direct proof, and the circumstances may be such in some cases as to contradict and overcome the direct and positive testimony of witnesses to the contrary. Circumstantial evidence consists in reasoning from the facts which are known or proved to establish such as are conjectured to exist. The process is fatally vicious if the circumstances from which we seek to deduce the conclusion depend also upon conjecture or inference, whether they arise in a civil or a criminal case. \* \* \* In *People vs. Kennedy*, 32 N. Y., 141, Justice Denio, speaking for the court with reference to this kind of proof, said: 'The logic upon which circumstantial evidence is based is this: That we know from our

experience that certain things are concomitant of each other. In seeking to establish evidence of one, when the direct proof is deficient or uncertain, we prove the certain existence of the correlative fact, and this establishes with more or less certainty, according to the nature of the case, the reality of the principal fact. But the reasoning is a perfect fallacy if the defect of proof which renders it necessary to call for the aid of the collateral circumstances equally attaches to such collateral circumstances. **‘It is like the blind leading the blind.’** When circumstantial evidence is relied upon to prove a fact, the circumstances themselves must be proved and not presumed.”

In **United States Fidelity & Guaranty Company vs. Des Moines National Bank** (145 Federal Reporter, 273), the action was instituted by the bank against the Fidelity Company to recover on its contract of insurance for the alleged defalcation of one Kelly, an employee of the bank, the proof showed an actual shortage in the bank’s reserve cash of \$5000, but what became of the money was not shown but left to conjecture. The evidence was wholly circumstantial. Mr. Circuit Judge Van Devanter, speaking for the Circuit Court of Appeals in the Eighth Circuit, used this language:

“Thus the charge proceeded upon the view that, while the matter of when and how the loss

occurred and what became of the money was not shown but left to conjecture, Kelly's relation to the money, his control over it, and his custody of it, were such that the jury would be justified in inferring that the loss, because not shown to be otherwise, was in some way or other the result of culpable negligence on his part. \* \* \*

We cannot concur in that view. It presupposes that the reserve cash was within the control and custody of Kelly, and applies to him the rule applicable to a bailee or other custodian whose situation is such that the loss, if not otherwise explained, warrants the inference that it was due to his negligence or dishonesty. Kelly occupied no such relation to this money. \* \* \*

It is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one or the other of the employees, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelly. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor. Asback vs.



Chicago, etc. Ry. Co., 74 Iowa, 248, 37 N. W., 182. \* \* \* As well said by the Supreme Court of Iowa in *Asback vs. Chicago, etc. Ry. Co.*: ‘A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory.’ ”

In *Cosgrove vs. Pitman* (103 California, 268), the Supreme Court of California used the following language:

“Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer arbitrarily and without evidence that there was negligence. When a fact is established, some other fact may be justly inferred therefrom; but, when a plaintiff instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred gives the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption, the inference cannot be drawn from a presumption, but must be founded upon some fact legally established.”

In **United States vs. Ross** (92 United States, 281), speaking of the impropriety of basing a presumption upon a presumption, of drawing an inference from an inference, the Supreme Court said:

“Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. The law requires an open, visible connection between the principle and evidentiary facts, and the deduction from them, and does not permit a decision to be made on remote inferences.”

In **Manning vs. John Hancock Mutual Life Insurance Company** (100 United States, 699), the Supreme Court used this pertinent language:

“We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in *U.S. vs. Ross*, 92 U. S., 281, 284, we said: ‘Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.’ Referring to the rule laid down in *Starkie on Evidence*, page 80, we

added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption.'

And, in **Globe Accident Insurance Company vs. Gerisch** (165 Illinois, 625, 54 American State Reports, 486), the action was brought to recover under a contract of casualty insurance indemnifying against injuries resulting, directly and independently of all other causes, through external, violent and accidental means. The facts are sufficiently indicated in the following excerpt from the opinion of the Court:

"There is, however, no proof that the deceased strained and injured his body 'by lifting a box of cinders and ashes,' and one essential fact, indeed, the all important fact, is therefore wanting in order to make out this case. If from the fact that he lifted a box of ashes and from the

further fact that he, not long afterward, suffered from the effects of a strain, it can be inferred that such strain was caused by so lifting said box of ashes, the missing link in the chain will be supplied. But this presumption cannot be indulged. As we have seen, the fact upon which it is sought to base this presumption, viz., that Gerisch lifted the box, is itself but a presumption drawn from other facts in evidence, and the law is, that a presumption cannot be based upon a presumption, for there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption: *Dougless vs Mitchell*, 35 Pa. St., 440; *United States vs. Crusell*, 14 Wall., 1; *United States vs. Ross*, 92 U. S., 281. In the case last cited, it is said, in passing upon this question: 'Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' The record therefore does not make out a **prima facie** case for the plaintiff, and the trial court erred in overruling the demurrer to the evidence."

Tested by this rule, the most that can either be fairly or justly claimed from the circumstances



urged by Plaintiff in Error, namely, the wound in the mouth and the finding of the weapon near the body is that they show that the insured met a violent death; but how or by whom that wound was inflicted is purely a matter of conjecture.

But assuming, with Counsel for Plaintiff in Error, for the purpose of the argument, that the pistol found near the body was the producing cause of death, even then, the isolated circumstances urged by Plaintiff in Error against this judgment, are not, when considered in the light of judicial precedent, so unerring as to necessarily negative the theory of accidental death. The cases cited and analyzed in the preceding pages of this Argument were selected because the circumstances in each are of very similar import to the isolated facts relied upon by the defendant Company here, even when aided by the unwarranted assumption of an important link in the chain of circumstances, yet the State and Federal Courts have refused to hold that the jury was not justified in finding against the theory of self-destruction, and declining to interfere with the verdict. Counsel assumes the vital, pivotal, connecting link or circumstance, without which the circumstances in evidence prove nothing but death by violence; and it would be going far to say, in the face of the language of the Supreme Court (*Grand Lodge vs. Beck, supra*), that such a wound could not have been the result of accident, from a care-

less handling or examination of the weapon, in view of the fact, which the evidence tends to disclose, that the insured was unfamiliar with its use (Record, page 112), and in view of the further fact, testified to by Doctor Gibson, under examination by Plaintiff in Error, that there were several circumstances under which such a wound might be caused by a gunshot discharged from a point outside the mouth, namely, "yawning, retching, hallooing or crying out in agony." (Record, page, 202.) But, when all of the circumstances disclosed by this record are considered as a whole, whatever sinister significance the isolated circumstances relied upon by Plaintiff in Error may have, as a matter of first impression, sink into insignificance as indictive of the cause of death. There is much to indicate that the Savage automatic pistol was not the instrumentality of death, such, for instance, as dirt in the barrel of the pistol, indicating that it had not been recently discharged; the size of the wound in the throat compared with the caliber of the weapon; the high power and penetrating force of the Savage automatic, carrying steel-jacketed bullets, coupled with the fact that the wound in the mouth had no exit, nor was any shot heard, or any ball or other missile found in the wound, and the injury to the forehead, which, on the theory of self-destruction is not only unexplained—it is inexplicable.

So far as the alleged purchase of the pistol is

concerned,—Who can read the testimony of the WITNESS COLLINS (Record, pages 110-113, and 128-143) and say that the jury was not justified in doubting that he sold either the, or any, pistol to William C. Neasham? The only matter, occurring during the preceding twenty years, about which he was certain, according to his testimony on cross-examination, was the particular alleged transaction with the insured; and the witness did not even pretend to identify the weapon by its number, but by a private mark on the magazine, and he told the jury that he had sold, during that year, a hundred Savage automatic pistols, marked them all in the same place, with the same punch (Record, page 142); and the amusing part of the whole thing was **that no punch mark is visible on the magazine** (Vide, Exhibit No. 1). But assuming that there was some mark visible only to the witness himself, as a matter of inference **it is just a hundred to one that Collins did not sell to William C. Neasham the particular pistol found by the body!** That the Savage automatic pistol was found near the body is conceded; that it was ever sold by Collins to Neasham is open to grave doubt; that that pistol was the instrumentality of death is at best a matter of conjecture, surmise, speculation!

But assuming this, it is not of much significance. It may have been dictated by any one of the many considerations which prompt the purchase of such

weapons and in no wise connected with a purpose of the insured to take his own life. And as to finding the weapon by the body, that is a feature which characterizes so many of the cases cited in this Brief as to have little, if any, significance. As was said by the Supreme Court of Minnesota, in *Kornig vs. Western Life Indemnity Company*, *supra*, in discussing the circumstance of a revolver found loosely gripped in the right hand of the deceased:

“In the nature of things this circumstance is by no means conclusive. Nothing is more common in the history of crime than to place the means of death near or in the hands of the victim.”

And, as graphically stated by the Supreme Court of Kentucky, in *Aetna Life Insurance Company vs. Milward*, *supra*, speaking of such weapons being found in the immediate presence of the deceased:

“In the absence of mental derangement, of any known fact calculated to unseat the judgment and to overcome the love of life, the inquiring mind naturally and properly looks for other causes of the deed when death by violence occurs. When all of the facts are inconsistent with the theory of suicide, except simply the dead body in the presence of its instrument it would be unnatural and illogical to confine the



inquiry to that incident, and declare the death suicide."

### THE THEORY OF ASSASSINATION:

Whilst it may be readily inferred, from all the evidence, that the wound in the mouth of deceased was inflicted in a close, deadly struggle with an assailant, or after insured had been knocked down with a blow on the head, causing the otherwise unexplained injury on the forehead, the weapon was discharged in his mouth; and, if so caused, the injury in the forehead, according to the uncontradicted evidence of Doctor Ascher would not take on the characteristics of discoloration as under other circumstances; and to account for the condition of the clothing, the large fresh blood-stains at the elbow of the right arm, and the absence of any indication of a struggle where the body lay, it might well be that the assault was committed on the railroad track, or at the point indicated by the Witness Burke, where he "observed that someone had been lying down" and the body carried to the gravel pit and there disposed, as found, for the very purpose of indicating to mere superficial observers the fact of suicide; and if so, then, the peculiar atavism of crime might cause the assassin to leave the weapon by the body in the very condition which Ferrel swore at the inquest the pistol was in when he picked it up! Over and over again, every variety of human intelligence has endeavored to create an arbitrary consistency of

events; Over and over again, human ingenuity and human intelligence have failed to make the requisite adjustment! To make the case of murder complete, there is nothing lacking from this Record but the identity of the assassin. The **corpus delicti** is established by an overwhelming mass of circumstances—cogent, consistent, convincing! No one of them inconsistent with the crime of murder. A man in the prime of life, in good health, of a cheerful and happy frame of mind, owning a large ranch, in fairly easy financial circumstances, living in town with his family, “an ideal family”,—with eight hundred dollars, is at home all the morning, dresses the baby, helps his wife, has breakfast with the family, and at about 8:30 o’clock goes down town—in one short hour he is dead. There is an injury in the forehead, probably resulting from a blow from some blunt instrument, applied with sufficient force to knock him down and perhaps render him unconscious, a wound in the throat, large enough to enable the insertion of the middle finger of a man’s hand, the exact cause of which is left to conjecture, and perhaps other injuries. The surgeon performing the autopsy said that death was immediate. Four or five persons, two from Reno, one from Sparks, the other or others wholly unaccounted for, met at the place where the body lay—just out for a walk, they heard no shot, and the insured was still breathing when, according to their story, they arrived at the

scene. They took the only possible course to divert suspicion from themselves; they suggested suicide, and notified the authorities in Reno. The regularly constituted officials—the Coroner, Sheriff and Undertaker hastened to the scene and with a mere superficial examination, with an autopsy unworthy of the name pronounced the death suicide, and then, as disclosed by this Record, bent every effort to vindicate their preconceived opinion, which was utterly at war with most, if not in fact all, of the evidentiary facts and circumstances in the case. The jury, in the calm atmosphere which pervades the Federal Courts, may well have reasoned in this way, and it would not involve a resort to speculation, but legitimate deductions from all of the evidence in the case (*Aetna Life Insurance Company vs. Milward, supra.*)

Since Counsel for Plaintiff in Error seem to see visions—**Omne ignotum pro magnifico est!** they might with equal prodigality predicate their preconceived theory of self-destruction on the fact, disclosed by the record, page 309, that the insured was born in the State of California on the 13th day of November, 1866!

### **MISCONCEPTION OF PLAINTIFF IN ERROR REGARDING THE LEGAL PRINCIPLES INVOLVED:**

The authorities relied upon by Plaintiff in Error, regarding the Burden of Proof, are confined with-

out exception either (A) To contracts of accident insurance; or (B) To some peculiar form of Life Insurance contract. Unquestionably, where the action proceeds upon a contract of accident or casualty insurance the burden of bringing the **cause** of the injury or death within the terms of the contract ("external, violent and accidental means" being the usual formula of such policies), rests upon the beneficiary. But that is not this case. Here, the contract is payable by its terms on due proof of death, and the provision relied upon by Plaintiff in Error is an **exception** printed on the third page; and under these circumstances it has been sufficiently demonstrated that the burden of proof rested upon the Company. In **Fondi vs. Boston Mutual Life Insurance Company** (112 Northeastern Reporter, 612), cited at page 91 of the Brief for Plaintiff in Error, the contract of insurance contained the following clause, as a condition precedent to the taking effect of the contract:

**"Provided, however, that no obligation is assumed by said Company prior to the date hereof nor unless on said date the insured is alive, in sound health," etc.**

The contest there turned on the question whether or no the insured was in **sound health** on the date referred to in the policy as the point of time when the same should take effect. Of course, the Supreme Court of Massachusetts held, under



the peculiar provision of the contract presented, that the burden of proof was upon the plaintiff. The case is not in point. With this explanation, there is nothing in the 128-page Brief of Plaintiff in Error which requires further notice.

**DAMAGES MIGHT BE IMPOSED  
UNDER RULE 30:**

It is respectfully submitted that no sufficient reason can be assigned from this Record in support of the contention that the insured deliberately committed suicide; on the contrary, in view of all of the evidence in the case, it is submitted that the efforts of Plaintiff in Error to defeat this contract have been made without any **bona fide** expectation of establishing the theory of self-destruction but rather with the idea of delay; and, if so, under the provisions of paragraph 2, Rule 30, Plaintiff in Error, in addition to the judgment, interest and costs, might very properly be adjudged to pay the beneficiary (Defendant in Error) reasonable damages.

THOMAS E. KEPNER,  
Attorney for Defendant in Error,  
Reno, Nevada.

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

---

REPLY BRIEF FOR PLAINTIFF  
IN ERROR.

---

FILED  
FEB 6 - 1918  
F. D. MONCKTON,  
Clerk

CHENEY, DOWNER, PRICE & HAWKINS,  
Attorneys for Plaintiff in Error.

JAMES H. McINTOSH,  
Of Counsel.

---



**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

---

No. 3057.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

**Reply Brief for Plaintiff in Error.**

There are statements, both as to facts and law, and citations of authorities in the Brief and Argument for defendant in error, to which we desire to reply in a more permanent and definite way and manner than by an oral argument; hence this Reply Brief for plaintiff in error. We shall herein refer to defendant in error as plaintiff, to plaintiff in error as defendant, to Transcript of Record as Tr., as in the Brief for plaintiff in error heretofore filed herein, and to the Brief and Argument for defendant in error as plaintiff's brief, and to the Brief for plaintiff in error as defendant's brief.

Plaintiff in her brief, pp. 46-54, discusses—Assignment of Error VII, Tr. 58, 59, specified at pp. 69-71, and argued at pp. 69-104, respectively, in defendant's brief; said assignment being to the effect that the Court erred in permitting plaintiff, over de-



fendant's objection, to offer and read in evidence what purported to be a portion of the testimony of Sheriff Ferrel given as a witness before the coroner, concerning the condition of the pistol referred to in the record.

At pp. 50, 51 of her brief, plaintiff sets out a part of the examination of Sheriff Ferrel, which said testimony appears in Tr. 165, 166, and then plaintiff makes the following statement,—

“The record, therefore, does not sustain the statement in the alleged error, numbered VII, ‘Said witness having previously testified \* \* \* that he did not give the testimony attributed to him’; on the contrary, the witness expressly admitted giving the testimony referred to.”

We are astounded at plaintiff's contention and the statement above quoted. We ask that the Court turn to the Transcript, p. 165, and read the record there found concerning this matter, Tr. 165–167; it will be seen that immediately following the questions and answers set out in plaintiff's brief, *supra*, pp. 50, 51, the following questions and answers appear,—

“Q. Now the question was repeated: ‘Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber, and there is nine in the magazine.’ Did you so testify?

A. *No, sir, I did not.* I will explain my testimony.

The COURT.—No, he is just asking you about this testimony.

WITNESS.—They got the answers to the questions mixed.

Mr. KEPNER.—(Q.) What is that?

A. They have got the answers to the questions mixed, that is all.

The COURT.—Did you state in substance then, Mr. Sheriff, at that inquest, that you had removed the shell from the chamber, and that there were nine shells in the magazine?

A. No. The magazine won't hold nine shells.

Q. You have stated it twice there.

A. *I never saw that testimony*—I haven't seen what this lady has written down.

Mr. KEPNER.—Well, I suppose this lady would take correctly what you testify.

A. I suppose that, too, *but I didn't see it.*

The COURT.—That is an immaterial digression.

Mr. KEPNER.—(Q.) Now did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger?

A. *I did not.*”

In the light of this record, how can plaintiff justify the statement contained in her brief, p. 51, which is above quoted?

Again at p. 54, plaintiff says,—

“So, plaintiff in error is mistaken in asserting in this alleged error (No. VII) that ‘There is no statute authorizing the use of such testimony’; and is unfair in stating the manner in which the testimony referred to was used.”

We repeat the statement complained of, and must earnestly urge that the use made by plaintiff of the purported testimony of witness Sheriff Ferrel before the coroner, under the record in this case, was prejudicial error, and is not authorized or supported by any statute, rule or decisions of courts. (See Defendant's Brief, pp. 96-104.)

The authorities cited by plaintiff, Brief, pp. 47-49, do not sustain plaintiff's contention; on the contrary, they sustain the contention of defendant that the admission in evidence of the purported testimony of witness Sheriff Ferrel, which was admitted in evidence over defendant's objection, under the record in this case, was a violation of all rules and was error, prejudicial to defendant.

To sustain her contention in this regard, plaintiff, at p. 47 in Her Brief, quotes a note found in Kerr's Cyclopedic Codes of California, vol. 4, Penal Code, under sec. 1515, p. 1365. The note cites two California cases,—*People v. Devine*, 44 Cal. 452, 459; *People v. Lambert*, 170 Cal. 170, the citation being error, and should read 120 Cal. 170, 50 Pac. should be 52 Pac. 307; in plaintiff's brief the errors in citation above noted are found. Perhaps plaintiff's attorney did not take the trouble to look up the case; if he had, he probably would have corrected the erroneous citation and further, if he had read the two cases cited, they would perhaps not have been cited in support of plaintiff's contention under the record in this case.

It will be recalled, as above set forth, that witness Sheriff Ferrel, Tr. 167, said—

“I never saw that testimony— \* \* \* but I didn’t see it.”

Also—when plaintiff’s attorney offered in evidence the testimony herein referred to, as appears at Tr. 251, defendant’s attorney objected to the offer, the record reciting in that regard—

“Mr. HAWKINS.—I object to the offer on the ground it is not signed by the witness; and on the further ground it is incompetent, irrelevant and immaterial.”

The objection was overruled, and exception reserved, Tr. 252, and the testimony read to the jury.

We, therefore, have in connection with this record offered and admitted in evidence a statement by the witness that he never saw that testimony; and the objection that it was not signed by the witness, and that it was incompetent.

Referring now to the case cited by plaintiff, *supra*, People v. Devine, 44 Cal. 452—it was a criminal prosecution, defendant convicted of the crime of murder in the first degree; an inquest had been held, upon the body of Kamp, the deceased, by the coroner; that at the inquest the witness Mary Murphy had been sworn and had testified; at the trial it was sought to impeach the witness’ testimony so given by the testimony given before the coroner; from the opinion, p. 455, we quote,—

“The inquest returned by the coroner and filed in the office of the clerk of the court below, and containing or purporting to contain the testimony of Mary Murphy, taken down under the



direction of the coroner, *signed by the witness*, by her mark and her signature, attested by the coroner's clerk and certified by the coroner himself, was then produced by the counsel for the prisoner and offered as evidence of a supposed contradiction."

At p. 456, it appears that the coroner and his clerk were both called and examined concerning the testimony of the witness given at the inquest and as to the circumstances under which it had been reduced to writing and returned. From the opinion we quote,—

"The statement of the testimony of the witness appeared to be *in the handwriting of the clerk*, and to have been taken down by him in the method stated to have been uniformly pursued by Dr. Letterman while he was coroner; that method was that the witness, being first duly sworn, was examined by the coroner in the presence of the jury, and the answers given were repeated by the coroner to the clerk, who thereupon wrote them down as given to him by the coroner. Upon the conclusion of the examination of the witness *the testimony* taken down in this manner *was read aloud for the purpose of correction* in any particular desired, and was thereupon *subscribed by the witness*, and if subscribed by mark (*as was the case with the testimony of Mary Murphy*), *was attested by the clerk.*"

Thus we see that in the case cited it appeared that the purported testimony offered for purposes of im-

peachment had been read over to the witness and had been signed by the witness; thus making the document the statement of the witness, which the Court held was proper. The Court cites several authorities in support of its conclusion, among them being *People v. Stephens*, 19 N. Y. 549. From the syllabus of the *Stephens* case, *supra*, we quote the following,—

“For the purpose of discrediting a witness, his testimony given before the coroner, taken down in writing, *read over to and subscribed by the witness*, may be read in evidence, \* \* \*

At p. 573 of the opinion in the *Stephens* case, *supra*, it appears that the coroner's clerk was sworn and testified as a witness; from the opinion we quote,—

“He testified that he had taken down the evidence of each witness correctly; that he had *read it over* to the witness, and that such *witness had then signed* his or her name to the *written deposition*. \* \* \*

The papers were not mere memoranda made by the clerk to help his recollection, but were *depositions signed by the witnesses after they had been deliberately read over to them*, and they had been requested to make or suggest alterations if they were incorrect.”

No such facts were shown in the case at bar.

The Court in *People v. Devine*, *supra*, 459, says,—

“The proper practice to be pursued by an officer in taking and certifying testimony at an

inquest is referred to by Guernsey, B., in R. V. Plummer, 1 Car. & Kir. 604."

The course pointed out in the authority cited is that the testimony of the witnesses should be reduced to writing, and then read over to and signed by them. It is the testimony thus taken which may be introduced in evidence, as is clearly shown from the opinion of the Court in the Devine case, *supra*, where at p. 459 the Court says,—

"That a witness may be contradicted by the production of a *deposition thus given* by him before a coroner, is as clear upon principle as that he might be contradicted by the production of his *deposition in chancery*."

People v. Lambert, 120 Cal. 170, 52 Pac. 307, *supra*, cited by plaintiff, was not a proceeding before a coroner, but before a justice of the peace. From the 52 Pac. 309 it appears that "Christopher Lambert was a witness for the defendant. Upon cross-examination his attention was called to his testimony given before the justice of the peace, and the *deposition* was read." *The witness testified that the document as read was his former testimony.* The error complained of was in reading "the entire *deposition* of the witness taken in the Justice Court at the *preliminary examination*." Clearly the case is not applicable to the facts in the case at bar.

Defendant does not contend that a deposition of a witness taken before a coroner and read over to and signed by the witness would not be admissible; but defendant's contention in this case is that the document used was never more than hearsay; that

there was no evidence whatever establishing as a fact that witness Ferrel had testified before the coroner as was recited in the document offered and admitted in evidence. The witness denied positively and emphatically that he had given such testimony; there was no attempt by plaintiff to show that the purported document correctly represented or stated the witness' testimony before the coroner.

Plaintiff also cites and quotes from Enc. of Evidence, vol. VII, pp. 54-57. The text refers to testimony before "a coroner's inquest," citing cases under Note 65. All of such cases contemplate that the deposition or testimony so offered for impeachment purposes had been read to and signed by the witnesses; in fact, some of the cases, e. g.,—

Consolidated Ice Machine Co. v. Keifer (Ill.), 25 N. E. 799, 802, recites in the opinion that the testimony was identified, that it was taken down by the coroner and signed by the witnesses. From the opinion we quote,—

"Their deposition before the coroner had been read to, and signed by, these witnesses, and on cross-examination their attention had been particularly directed thereto. This evidence was offered by way of impeachment, and was entirely competent. The mode of examination seems to have conformed to the rule in reference to examination in respect of written instruments. 1 Greenl., secs. 463, 465."

The reference by plaintiff in her Brief, p. 48, to the case of O'Brien v. Trousdale, decided by the Nevada Supreme Court, does not aid the plaintiff;



that case was in reference to a writ of prohibition. The rule stated by the Nevada Supreme Court is well recognized, provided the statute being interpreted is truly copied from some one state; but the rule is equally well established that where the statute under consideration may have been adopted from one of many states, the rule has no application. Assuming that the rule is applicable here we have, according to plaintiff's contention, the adoption by Nevada of its statute, sec. 7550, from the California statute, sec. 1515, Penal Code, *supra*, as construed by the opinion in *People v. Devine*, *supra*, 44 Cal. 452, which is to the effect that the deposition to be competent evidence must have been read over to and signed by the witness which does not appear to have been done in the case at bar.

Enc. of Evidence, vol. VII, p. 128, states the rule,—

“A witness' variant statements may be proved by any evidence usually competent in a cause. They cannot be proved by mere hearsay.”

The same author at p. 139 says,—

“A writing said to contain a rehearsal of a witness' variant statements, but *to which he has not assented*, and which has not been proved to be correct, ordinarily is not by itself competent as evidence to prove such statements.”

In *Ferraris v. Kyle*, 19 Nev. 435, 436, for the purpose of establishing the variance of former testimony, defendant offered in evidence the statement

upon motion for new trial; the offer was refused; the Court at p. 437 says,—

“A document prepared in this way, it is scarcely necessary to say, should not be received without preliminary proof that *its report of the evidence is correct.*”

Nevada Constitution, art. VI, sec. 1, provides,—

“The judicial power of this State shall be vested in a Supreme Court, District Courts and in justices of the peace. \* \* \* ”

The coroner has no judicial functions, and his acts are not in a judicial capacity, and the inquisition had before the coroner has no probative value. This matter is exhaustively considered by Wolverton, Judge, in the case of *Cox v. Royal Tribe of Joseph*, 42 Or. 365, 71 Pac. 73, where the Court was considering the admissibility of a record before a coroner under the Oregon statute, similar to the Nevada statute. The Court at p. 75 of 71 Pac. says,—

“Such a document, before it can be admissible under any of the older authorities, must be judicial in character, and we cannot think that the mere fact that it is required to be returned to and filed with a clerk of a court of record endows it with that vitality.”

It appears from the record in this case that a document offered in evidence over defendant's objection had never been seen by the witness was not signed by him, and he denied emphatically that he had given the testimony purported therein to have

been given by him; it was, therefore, not established that he had made the statement attributed to him by such document; its admission clearly impressed the jury, and it was admitted in violation of law and was error, prejudicial to defendant.

Plaintiff in her brief, p. 51, says,—

“Moreover, the Record (see pages 165, 166, 167) shows no objection to the use of this transcript on cross-examination.”

That statement is true, but when plaintiff offered the coroner’s record, or a portion thereof, in evidence as appears at Tr. 251, defendant did object “to the offer on the ground it is not signed by the witness; and on the further ground it is incompetent, irrelevant and immaterial.” The objection was overruled, to which an exception was taken and the portion read in evidence, as appears Tr. 252.

Plaintiff at p. 54 of her Brief says that the matter read to the jury at their request,—

“JUROR.—We desire to have read the transcript of Sheriff Ferrel’s evidence before the coroner’s jury.

The COURT.—That was read during his examination?

JUROR.—Yes, sir, and taken in evidence.”

was the cross-examination appearing on pp. 165–166, and not the transcript of the evidence before the coroner’s jury. But it is apparent from the juror’s request that the mind of the jury was fixed upon the purported testimony before the coroner’s jury, and in fact the matter which was read to the jury incor-

porated all of the purported testimony before the coroner's jury, and answered the juror's request, and emphasized the error in admitting the purported evidence before the coroner's jury.

Plaintiff seemingly attempts to escape the effect of this error, and on p. 49 of her Brief refers to the fact that testimony incorporated in the coroner's transcript was read to the jury by consent. Consent to use matter that would not have been admissible without consent does not authorize the use of other matter not admissible over objection. By consent, incorporated into a written stipulation, as appears Tr. 114, testimony of persons who testified before the coroner was read. This consent and use in no way cures the admission, over objection, of matter offered by plaintiff, to which exception was taken and error assigned and specified.

Plaintiff in her Brief, pp. 54-79, discusses Assignment of Error No. XI, found in Tr. 62-66; specified at pp. 74-80, and argued at pp. 120-128, in defendant's Brief. Said assignment of error embraces the charge by the Court to the jury, whereby the jury was instructed, *inter alia*: That plaintiff has made out her cause of action; that the burden of proof was upon the defendant; that suicide or self-destruction was at variance with the ordinary human instincts and the presumption of the law was against self-destruction, and that self-destruction must be proved or established by evidence sufficient to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of death other than that of self-destruction; that the proof must



establish, with reasonable certainty that the death was the result of self-destruction, rather than accident, mischance, and if decedent was accidentally killed, although death results from his own acts, "it is not self-destruction or suicide so as to excuse a defendant's liability"; that if the jury find that the shooting was done by the deceased, but that it was done accidentally, or was the result of carelessness, the plaintiff would be entitled to a verdict; that the jury was permitted to base its verdict upon a theory wholly separate and apart from that advanced by either counsel, and if the jury in its examination of the evidence concludes it cannot account for the death in accordance with the theory advanced by either counsel, and could account for it in accordance with some other theory which the jury believe the evidence warrants, and that the jury was at perfect liberty to find its verdict according to such theory as suggests itself to the jury's judgment.

The assignment and the argument thereunder by defendant is attacked by plaintiff at other places in her Brief, to wit, near top of page 3, plaintiff says,—

"The issue, thus presented by the pleadings involving three theories of the cause of death, namely, Murder, Suicide, and Accident, was tried," etc.

At p. 95 of her brief, plaintiff says,—

"Plaintiff in error assumes that the wound in the throat was caused by a gunshot. There is no direct evidence to support that assumption."

This statement by plaintiff indicates the extent to which plaintiff's attorney will go in making statements to justify the verdict in this case.

At p. 55 plaintiff says,—

“The assignment is not based upon correct premises; the statement, as shown by the foregoing excerpt, omits a very important averment in plaintiff's replication.”

Plaintiff's assertions, above referred to, are not warranted under the record. The Court will, no doubt, be surprised, after its examination of the record, that plaintiff should now question the fact that the insured's death was the result of a gunshot wound or that the wound in the insured's mouth, through the soft palate in the back of the throat, was caused by a gunshot.

It is well settled in law that every pleading must be based upon some definite, consistent theory; that plaintiff cannot try his case upon one theory and then, after finding himself unable to prove it, shift to another.

Defendant in its amended answer, Tr. 12, *inter alia* alleged,—“the insured in said policy, was discovered dead, with a gunshot wound in the roof of his mouth.” In this connection plaintiff in her reply, paragraph V, Tr. 15, 16, “alleges that \* \* \* the insured \* \* \* came to his death \* \* \* from a gunshot wound.” There is no evidence, or suggestion of evidence, that there was any gunshot wound other than the gunshot wound above referred to. Plaintiff's proof in chief, Plaintiff's Exhibit “B,” proofs of death Tr. 310, 311, establishes imme-

diate cause of death of the insured to be "gunshot wound of head and brain." There was no issue under the pleadings other than that the death of the insured resulted from a gunshot wound; the case throughout was tried upon that theory, and that theory alone; the issue was—was the gunshot wound self-inflicted or inflicted by another, viz., "Self-destruction" vs. "Murder"? Plaintiff's theory being that insured was attacked and shot by the attacking person or persons. Throughout the record will be found statements sustaining the above statement as to the theory upon which the case was tried, and no statement appears in the record to the contrary until we come to the charge of the Court, submitting to the jury the question of accident, mischance or some theory other than "that advanced by either counsel," the theory referred to by the Court as "advanced by either counsel" being "Self-destruction," contended for by defendant, and "Murder," contended for by plaintiff.

Plaintiff in her Brief, p. 55 et seq., and at other places above referred to, seeks to justify the Court's submission to the jury of the question of accidental death or death by mischance, and cites cases discussing and declaring the law applicable to a case wherein the three issues—Murder, Suicide and Accident—are presented. Such cases are not applicable to and are easily distinguishable from the case at bar.

The pleadings, in the case at bar, not only do not involve but exclude "Accident" or "Mischance," and only present a case of death from a gunshot wound—the issue joined and tried being, Was it intentional

self-destruction or intentional killing by some one “other than the insured”?

The defendant in its amended answer alleged “the insured in said policy was discovered dead, with a gunshot wound in the roof of his mouth. That \* \* \* the insured \* \* \* destroyed himself, and then and there died as the result of a self-inflicted gunshot wound.” (Tr. 12.) The plaintiff denied in her reply that Neasham “either *destroyed* himself, or either \* \* \* died as the result of a *self-inflicted* gunshot wound, and in this behalf plaintiff alleges that \* \* \* the insured \* \* \* came to his death \* \* \* at the hands of some person or persons unknown to plaintiff.” (Tr. 14.) “And for a further reply \* \* \* plaintiff alleges that \* \* \* the insured \* \* \* came to his death \* \* \* from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff.” (Tr. 15, 16.) “Some person or persons unknown—some person or persons other than the insured,” as contended by plaintiff in Opening Statement. (Tr. 75.)

It is therefore manifest, from the pleadings and the statement of plaintiff that plaintiff’s contention was that the insured did not “destroy himself” and did not die “as the result of a *self-inflicted* gunshot wound,” and, therefore, necessarily did not shoot himself, either by *accident or mischance* or intentionally or at all, but that he was shot by some other person—clearly, positively and without doubt removing from the case any question of the death resulting from accident or mischance *on the part of the insured*.



No argument is necessary to establish the fact, under the pleadings and the evidence in this case, that if some other person shot the insured, that it was intentional and not by accident; hence death by accident or mischance was not presented by the pleadings as an issue, but was clearly eliminated from the case.

Therefore the authorities cited and contention made by plaintiff involving the question of accidental death or death by mischance are not applicable to this case; it is not a case made by pleadings based upon an *accident* policy creating a liability, upon a death, within the meaning of such accident policy against injury or death through "external, violent and accidental means," as were many of the cases cited by plaintiff, all of which, upon examination, are clearly distinguishable from the case at bar.

Plaintiff in her Brief, p. 77, referring to the case of *Agen v. Metropolitan Life Ins. Co. (Wis.)*, 80 N. W. 1020, cited in defendant's Brief at pp. 85, 119, 127, 128, says,—

"And, it is some satisfaction to call attention to the fact that whatever value the case may ever have been entitled to, it has been greatly weakened by the subsequent decisions of the Supreme Court of that state; for instance, in the case of *Rohloff v. Aid Association* (109 Northwestern Reporter, 989, 991)."

The Court in the *Rohloff* case, *supra*, did not adversely criticise the holding in the *Agen v. Metropolitan Life Insurance Company* case, *supra*; indeed, the Court seems to have approved the doctrine therein

stated. From the opinion in the Rohloff case, pp. 991, 992, we quote,—

“The *facts* in this case are *very different* from those in the cases relied upon by counsel: Agen v. M. L. I. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; Voelkel v. Supreme T. K. M. W., 116 Wis. 202, 92 N. W. 1104.”

In Hart v. Fraternal Alliance, cited in the opinion just quoted, in 84 N. W. 853, the Court says,—

“The verdict rendered was founded on mere speculation, and is against every reasonable probability in the case. \* \* \* The judgment is reversed, and the cause is remanded for a new trial.”

In Voelkel v. Supreme T. K. M. W., cited in the opinion in the Rohloff case, *supra*, the Court in 92 N. W. 1105 says,—

“To us it does not seem that there is a single fact in the case that suggests any other cause of death than suicide. The proofs of death, with the accompanying circumstances referred to, make the case quite as strong against the plaintiff as in Agen v. Insurance Co., 105 Wis. 217, 80 N. W. 1021, 76 Am. St. Rep. 905, and Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851, and justify the trial court in its ruling. The judgment is affirmed.”

Upon the whole case, we earnestly insist that the judgment is not warranted, is unjust, and should be reversed; that the rulings of the trial court during

the trial, complained of, were error; that the charge by the Court to the jury in all and each of the particulars complained of and assigned as error was error prejudicial to the defendant; and that the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,  
CHENEY, DOWNER, PRICE & HAWKINS,  
Attorneys for Plaintiff in Error.  
JAMES H. McINTOSH,  
Of Counsel.

IN THE  
United States Circuit Court of Appeal  
For the Ninth Circuit

NEW YORK LIFE INSURANCE COM-  
PANY, a corporation,  
*Plaintiff in Error.*

vs.

MATILDA C. NEASHAM,  
*Defendant in Error.*

PETITION FOR REHEARING

THOMAS E. KEPNER,  
*Attorney for Defendant in Error.*

Filed this \_\_\_\_\_ day of \_\_\_\_\_ 1918

FRANK D. MONCKTON, Clerk.

By \_\_\_\_\_ Deputy.





No. 3057

IN THE

United States Circuit Court of Appeal

For the Ninth Circuit

---

NEW YORK LIFE INSURANCE COM-  
PANY, a corporation,

*Plaintiff in Error.*

vs.

MATILDA C. NEASHAM,

*Defendant in Error.*

---

PETITION FOR REHEARING:

And now comes Matilda C. Neasham, the defendant in error above-named, by Thomas E. Kepner, her Attorney, and respectfully petitions and moves the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, to grant a rehearing upon the particular point involved in the opinion of the Court filed herein on April 1, 1918,

THOMAS E. KEPNER,

*Attorney for Defendant in Error.*

Counsel desires to apologize to the Court for failing to ask leave at the time this case was called for argument to file a supplemental brief in answer to the so-called Reply Brief of plaintiff in error. It appears from the record that that Reply Brief was served and filed on the eve of the argument, and doubtless an answer in printed form should have been filed. Counsel now apologizes to the Court for failing to ask leave to file such answer.

An examination of the authorities, on the precise point involved, made since the argument on February 8, 1918, and re-examined since the opinion of the Court herein was filed, has served to convince counsel and, it is submitted, should satisfy the Court, that the method of impeachment adopted at the trial of this cause, was the only legal method, under the Statute of Nevada, of challenging the veracity of the witness; that, had the course of procedure urged by Plaintiff in Error in its so-called Reply Brief, and approved by the Court in the opinion referred to, been followed, it would have been a gross error, which if objected to and timely urged upon your Honors would doubtless have resulted in a reversal of the judgment. Under such circumstances, and wholly aside from the instant case, it seems to be an imperative duty resting upon counsel to present the authorities which sustain the ruling of the District Court in this Petition for Rehearing.

## THE ISSUE OF LAW DEFINED.

It is not profitable to discuss conceded propositions or those not involved in this Petition. It is, therefore, conceded that the impeaching testimony was and is important. It is conceded that the impeaching testimony is not in the form of a deposition. It is conceded that it was neither read over to the witness at the inquest nor signed by him. There remains but one question, namely, the meaning and effect of the Statute of Nevada, which provides, in so many words, that "The testimony at such inquest shall be reduced to writing by the Justice of the Peace, acting as Coroner, or as he may direct, and by him, without delay, filed in the office of the Clerk of the District Court of the county." (Revised Laws of Nevada, 1912, Section 7550.)

And we urge that the impeaching testimony was taken in exact accord with the Statute; that it was reduced to writing, under direction of the Coroner, in strict accord with the mandate of the Statute; that it was filed in the proper archives and properly preserved. And that said testimony so taken, reduced to writing and filed, was and is the best evidence of what actually occurred at the inquest upon the body of William C. Neasham, Deceased.

Under all the circumstances, this petition for rehearing is presented with the confident expectation that Your Honors will approach the consider-



ation of the authorities presented with an open mind unaffected in any degree by the opinion heretofore formulated and expressed upon the subject.

In Underhill's Criminal Evidence, Section 40, page 50, it is said:

“Oral evidence is inadmissible if the law requires primary evidence in writing, or if the party to substantiate his claims must produce a writing. Judicial records, other public records, deeds of conveyance and contracts not to be performed within a year are required by statute to be in writing. Hence the fact of another indictment pending, a prior verdict of acquittal or conviction, **the proceedings and the testimony taken at a Coroner's inquest, or at the preliminary examination, or before the grand jury, or anybody keeping a record of its actions, must be shown by the records or by a properly authenticated copy.**”

In 1 Greenleaf on Evidence, 14th Edition, Section 227, the learned author says:

“As the statutes require that the magistrate shall reduce to writing the whole examination, or so much thereof as shall be material, the law **conclusively presumes**, that if anything was taken down in writing, the magistrate performed all his duty by taking down all that was material. In such case, no parole evidence of what

the prisoner may have said on that occasion can be received. But if it is shown that the examination was not reduced to writing; or if the written examination is wholly inadmissible, by reason of irregularity; parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected."

Continuing in Section 228, Greenleaf says:

"It has already been stated, that the **signature of the prisoner is not necessary** to the admissibility of his examination, though it is usually obtained."

In the case of *Woods v. State* (63 Ind. 353, at page 357), the Supreme Court of Indiana, treating of this precise question, said:

"The act prescribing the powers and duties of coroners, and providing for holding inquests upon the bodies of persons supposed to have come to their death by violence or casualty, enacts, that 'all persons desirous of being heard, shall be examined as witnesses, and the coroner may cause witnesses to be summoned by subpoena issued by him \* \* \* who shall answer all questions asked them on oath, touching such death.' Also, that 'all testimony shall be in

writing, subscribed by the witnesses,' etc. 2 R. S. 1876, p. 21, Secs. 8 and 9.

"In volume 1, Sec. 227, of Greenleaf's Evidence, it is said: 'The rule, that parol evidence cannot be given of any matter which has been reduced to writing, unless the writing cannot be introduced, is too well established to require the citation of authorities to sustain it.'

"Having in view the authorities above cited and the principles which they enunciate, we are constrained to hold that the court erred in permitting Mackedon, Schmidt and Deacon to testify as they did, as to what was sworn to before the coroner's jury."

In Robinson v. State (87 Ind., 292), it is said:

"Among the questions involved in the ruling upon the motion for a new trial we will consider but one. The others need not, or at least may not, arise upon a second trial of the case. The wife of the appellant testified in his behalf, and on cross-examination was asked, for the purpose of laying a foundation for impeachment, whether she did not, on her examination before the coroner at the inquest, make a certain statement inconsistent with her testimony. She answered in the negative; and, for the purpose of contradicting her, the coroner was called, and, over objection by the appellant that parol evidence was not admissible to show the

testimony of a witness at an inquest, that the coroner's written statement of the testimony delivered before him was the best evidence, and should be produced or its absence explained, was permitted to answer that she did make the statement imputed to her; that she made it in answer to a question put to her by Dr. Griffith just as she was leaving the witness stand; that Dr. Griffith was engaged at the time in making a **post mortem** examination of the deceased at the request of the coroner, and aided him in interrogating the witness; that he took down in writing such answers of the witness as he deemed material; that he did not take down the particular statement concerning which he had testified.

"The admission of this testimony, over the objections made to it, was erroneous. It is shown that the testimony of the witness before the coroner was reduced to writing; the presumption is that it was all, so far as material, reduced to writing, and, as the law requires, 'subscribed by the witness.' Woods v. State, 63 Ind. 353; Brown v. State, 71 Ind. 470; Whart Crim. Ev., Section 667; 1 Greenl. Ev. Section 227. These authorities declare the rule that where the proceedings before the coroner are regular, the record of the testimony taken before him will be the best evidence of what the testimony was, and parol evidence will not be received of anything not contained in the record; or, as



Wharton states it, 'the writing can not be verified by parol proof.'

"Even if it be competent to prove that statements were made at an inquest, and what they were, which were not reduced in writing, it is not competent to show by parol what the writing does not, any more than what it does, contain. The record of the proceedings must, if practicable, be produced; and if then it is found to be so irregular or imperfect as not to be admissible in evidence, other evidence may be adduced to show what testimony a witness delivered. *Brown v. State*, *supra*.

"It is suggested by the attorney-general, that the evidence in this instance was proper, because it was of a statement made in answer to a question by Dr. Griffith, and not on the examination of the coroner. It appears, however, that Dr. Griffith was assisting in the examination, and his interrogatories were adopted and treated by the coroner as his own. Besides, the question put to Mrs. Robinson and to the coroner and other witnesses, on the subject, called for what she had said 'upon her examination' at the inquest.

"Judgment reversed, with instructions to grant a new trial, and for that purpose the prisoner is ordered re-delivered to the Sheriff of Brown county."

United States Life Insurance Co. v. Kielgast (6 L. R. A., page 65, 22 N. E. 467, decided by the Supreme Court of Illinois, October 31, 1889), is also in point. The then Illinois Statute quoted on page 66 of the reporter as stated by the court, required the coroner to reduce to writing the testimony of each witness examined at the inquest, which testimony shall be filed by the coroner in his office and preserved. The court said:

“The foregoing are the principal sections of the Statute which relate to the inquest of the coroner; and from the nature and character of the proceeding, as it has been recognized by courts and law writers, we must determine whether a coroner’s inquisition should be used as evidence in a case of this character. It will be observed that the evidence of all witnesses examined before the coroner is required to remain in his office, while the inquest must be sealed up and returned to the clerk of the circuit court of the county, where it shall be filed. Thus the inquest becomes, by force of the Statute, a record of the circuit court,—a public record of the county where the inquest is held. It is a record containing the results of a public inquiry, made by a public officer under authority of law, relating to matters in which the public have an interest. Shall it be held that a public record of this character shall not be evidence in a judicial proceeding tending to prove the facts found to be

true on the face of such record? We are not prepared to adopt a rule of that kind. Moreover, we believe the weight of authority to be in favor of the admission of such evidence.

“1 Starkie, Ev. 1309, seems to lay down the rule that an inquisition is admissible in evidence. He says: ‘In *Sergeson v. Sealy*, 2 Atk. 412, Lord Hardwicke said that inquisitions of lunacy, inquisitions post mortem, and others, were always admissible, though not conclusive. In the case of *Burridge v. Earl of Sussex*, 2 Ld. Raym. 1292, an inquisition post mortem, setting out the tenor of a deed, was held to be evidence of the deed.’

“1 Greenleaf on Evidence, 8556, in speaking of inquisitions, says: ‘These are the result of inquiries made under competent public authority to ascertain matters of public interest and concern. They are said to be analogous to proceedings *in rem*, being made on behalf of the public; and that therefore no one can strictly be said to be a stranger to them. But the principle of their admissibility in evidence between private persons seems to be that they are matters of public and general interest, and therefore within some of the exceptions of the general rule in regard to hearsay evidence. \* \* \* The general rule in regard to those documents is that they are admissible in evidence, but they are not conclusive, except against the parties immediately con-

cerned and their privies.' See also, 2 Phil. Ev. 5th Am. Ed. 262; Taylor, Ev. 6th Ed. § 1487, where the same doctrine is announced.

"In *People v. Devine*, 44 Cal. 452, the question arose whether the evidence of a witness taken before the coroner could be used to contradict the evidence of the same witness subsequently given on a trial in court. In considering the question it is said: 'The testimony had been returned into court as part of certain proceedings judicial in their character, had before an officer appointed by law, and expressly charged with the duty of reducing or causing it to be reduced to writing, and returning it into court. At common law, as well as under the Statute of Edward I.; and our Statute concerning coroners, which are but declaratory of the common law, the coroner holding an inquest **super visum corporis** is in the performance of functions judicial in their character (*Reg. v. White*, 3 El. & El. 144; *Giles v. Brown*, 1 Mill. Const. Rep. (S. C.) 231; *Boisliniere v. St. Louis Co.*, 32 Mo. 375); so distinctly judicial that he is protected under the principles which protect judicial officers from responsibility in a civil action brought by a private person (*Garnett v. Ferrand*, 6 Bran. & C. 611). Whether his proceedings be entered upon the coroner's roll at common law and the Statute of Edward, or returned into court under our own Statute, they amount to entries concerning matters of



public interest, made under the sanction of an official oath, and in compliance, or presumed compliance, with the requirements of law. In our investigations we have not found any authority in text books or adjudicated cases which distinguishes between these and any other official proceedings taken and returned in the discharge of official duty, as to their admissibility in evidence upon the principle referred to.' See also, *Faulder v. Silk*, 3 Camp. 126; *Sills v. Brown*, 9 Car. & P. 601.

"The citation of other authorities would seem to be unnecessary. We are satisfied, both upon principle and authority, that the coroner's inquisition was admissible in evidence. The inquisition was made by a public officer, acting under the sanction of an official oath, in the discharge of a public duty enjoined upon him by the law; and when it is returned into court, and is filed, we see no reason why it should not be competent evidence tending to prove any matter properly before the coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered."

*Consolidated Ice Machine Company v. Keefer* (10 L. R. A. 696), is also in point:

"It is urged that the court erred in the admission of evidence. The witnesses Marion and Gaines testified at the trial that if the swivel in

the hog chain had not been defective, the truss would have supported from sixty to a hundred thousand pounds. On cross-examination, plaintiff showed by them that they testified at the coroner's inquest upon the body of Keifer, and, having identified the transcript of their testimony, as taken down by the coroner, and signed by them, they were asked if they did not state in that examination that the hog chain, if perfect, would have sustained about thirty tons, to which they answered they did not recollect. Plaintiff, in rebuttal, introduced in evidence that portion of the witnesses' testimony to which their attention had been called, which showed they did so testify. Their deposition before the coroner had been read to, and signed by, these witnesses, and on cross-examination their attention had been particularly directed thereto. This evidence was offered by way of impeachment, and was entirely competent. The mode of examination seems to have conformed to the rule in reference to examination in respect of written instruments. 1 Greenl. Ev. Secs. 463-465."

From the monographic note in the case of *Cox v. Royal Tribe* (42 Ore. 365; 71 Pac. 73; 95 Am. St. Rep., at page 722), the following excerpts are made:

Where the testimony before the coroner's inquest must be taken down in writing, the law conclusively presumes that it was done, and un-

less proper foundation be laid for secondary evidence, parol evidence of testimony given before the coroner by such witness is admissible, even to impeach him at the trial; *Woods v. State*, 63 Ind. 353. So where it is allowable to prove contradictory statements by introducing his written testimony at the inquest, it is not permissible to prove by parol other contradictory statements made by the witness at the same time, but not contained in the written testimony; *Moffatt v. State*, 35 Tex. Cr. Rep. 257, 33 S. W. 344.

“The deposition of a witness at a coroner’s inquest, as taken down by the coroner, is the best evidence of what such witness then swore: *State v. Prater*, 26 S. C. 198, 613, 2 S. E. 108; and parol evidence of what was sworn before such inquest and reduced to writing by the coroner, cannot be received; *State v. Zellers*, 7 N. J. L. 220.

“Where the proceedings before the coroner are regular, the record of the testimony taken before him is, of course, the best evidence of what such testimony was, and parol evidence of anything not therein contained is excluded; *Robinson v. State*, 87 Ind. 292. Where, however, the proceedings before the coroner are so irregular that the written examination is not admissible in evidence, it is competent to prove by parol what was testified to before him; *Brown v. State*, 71 Ind. 470.”

The rule is also stated in 40 Cyc. commencing on page 2708-2710, and in the authorities cited in notes 67 and 68, as follows:

“A witness may be discredited by showing that the **testimony** which he has given at the present trial or hearing is inconsistent with his testimony at a former trial of the same case, with **the testimony** which was given by him before the grand jury which found the indictment, or at the preliminary examination, with his testimony in a different case, in supplementary proceedings, or at a coroner’s inquest.”

In *People v. Bushton* (80 Cal. 160; 22 Pac. Rep. 127), the following is found:

“It is contended that the court below erred ‘in allowing purported testimony of the prosecuting witness, Hernandez, given at the coroner’s inquest, to be read in the presence and hearing of the jury, and in allowing the coroner to give evidence of the purported testimony given before him by Hernandez on that occasion, and that it erred in not striking out such evidence as hearsay.’ The evidence referred to was introduced for the purpose of impeaching the witness Hernandez, who had been put upon the stand by the prosecution, and testified in such a way as to prejudice the people’s case, and inconsistently with the testimony given by him at the coroner’s inquest. It was proper for this purpose to call



the attention of the witness to what he had testified before the coroner, and read the same in the presence of the jury, and upon his denial of said testimony, to prove that he did so testify."

In *Gasquet v. Pechin* (143 Cal., 515, 77 Pac. Rep. 481, at page 484), the following is found:

"The plaintiff on the trial offered to show that the deposition had been corrected by her before it was signed or filed, and that in her original testimony, before correcting it, she had added the word 'debt' to the part first quoted, so that the last clause would read thus, 'And I ought to pay whatever I can towards this debt,' and that the last clause of the latter portion of the deposition quoted originally stood thus, 'I suppose to pay what I owed if I could.' The proper foundation was offered for this testimony, but the court refused to allow it, assigning, as the reason for the ruling, that the witness was bound only by the terms of the deposition as finally corrected before signing. This ruling was erroneous, and the reason given fallacious. If her original statement was as claimed, and was inconsistent with the testimony given on the trial on a material point, it could be proven for the purposes of impeachment, regardless of the occasion upon which the original statement was made, provided, of course, that it was not privileged."

In *Lanigan v. Neely* (4 Cal. App. 760, 89 Pac. 441), it is held that a deposition neither read to, or

signed by the witness, and hence not admissible as a deposition, may nevertheless be used for the purpose of impeachment. The court at page 448 of the reporter said:

“The question was read from the deposition, time, place and persons present being given; but there was no objection to the form of the question or upon any other ground, except that the purported deposition was not one in fact or in law, because it had not been read to the defendant and an opportunity given him to correct it if he so desired, and that he had not subscribed his name thereto. The objection was without merit and the court’s ruling thereon eminently proper. “A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and person present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them. Section 2052, Code Civ. Proc. The document upon which this cross-examination was based was offered to the defendant to read before requiring a reply. That the question propounded was clearly within the rule authorizing the impeachment of a witness is beyond doubt. The

late case of *Gasquet v. Pechin*, 143 Cal., 521, 77 Pac. 481, puts the question beyond all cavil. There are, however, many California cases in support of the correctness of the ruling of the lower court. *People v. Lambert*, 120 Cal. 176, 52 Pac. 307; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Gardner*, 98 Cal. 132, 32 Pac. 880; *People v. Turner*, 65 Cal. 540, 4 Pac. 553; *People v. Bosquet*, 116 Cal. 75, 47 Pac. 879."

It is not necessary to render a witness' answers to interrogatories admissible, to contradict his testimony at the trial, that his answers should have been read to him before he signed his name thereto, it being sufficient to prove that he was a witness who was sworn and examined by the commissioner and whose answers the commission and return purported to give.

*Ecker v. McAllister*, 45 Md. 290.

And although the coroner was not legally authorized to hold an inquest, the witness' statements thereat are available to discredit him.

*State v. Dixon*, 131 N. C. 808, 42 S. E. Rep. 944.

In *Overtoom v. Chicago, etc. Railroad Company* (181 Illinois, 323, 54 Northeastern Reporter, 898, at page 900, column 2), the following is found:

The testimony of Silverman was taken by the coroner, and, as the statute required it, we will presume it was written out and signed by the

witness, and filed and preserved in the office of the coroner. Rev. St. C 31, 19. **Had his deposition thus taken been produced, and Silverman's attention properly directed to it, it could have been used to contradict him. \* \* \* That deposition was the best evidence, and the stenographer's notes were not admissible."**

In *State v. Donahue* (90 Southeastern Reporter, 834), the Supreme Court of West Virginia said:

"The first point of error is that the court below, proper ground being laid therefor, would not permit defendant to introduce in evidence to the jury the testimony of Everett Redman, taken before the coroner for the purpose of contradicting him, on material facts testified to by him on the trial before the jury. \* \* \* Redman's testimony before the coroner was offered for the purpose of contradicting him, not as evidence of the guilt or innocence of the accused. For the purposes offered **this evidence was legal and competent and should have been admitted."**

In *New York, Etc. Railroad Company v. Kallam's Administrator* (83 Virginia 581, 3 Southeastern Reporter, 703), the Supreme Court of Virginia used this language, found at page 707 of the reporter:

"3. The next question relates to the admissibility of certain evidence. At the trial several witnesses for the defendant were each asked,



upon cross examination, whether or not they had made certain statements, after being sworn as witnesses at the coroner's inquest, over the body of the deceased, to which they each answered in the negative. The plaintiff, at the proper time, offered in rebuttal extracts from the depositions of these witnesses taken at the coroner's inquest, which were admitted by the court, and the defendant excepted. The evidence thus admitted related to matters which were relevant to the issue, and, the proper foundation having been laid, was rightly admitted."

In *State v. Ashworth* (139 La. 590, 71 Southern Reporter, 860), the sixth sub-division of the syllabus prepared by the court says:

"The sworn testimony of a witness at a coroner's inquest may be read on the trial to discredit the witness."

In Vol. 2, *Elliott on Evidence*, Section 1372, the following is found:

"Another class of records which are admissible in evidence either as originals or by certified copy are those partaking somewhat of the character of judicial records. As defined in one case: 'They are the results of inquiries made under public authority concerning matters of public or general interest, though the affairs to which they relate may be private. They are generally the conclusions of juries, coroners,

commissioners or other officers under oath, and often, though not necessarily, based on evidence taken under oath.' **The principle upon which this class of records is admissible is that the return or report of persons appointed by law, or under the authority of law, to investigate any matter of fact under oath, not being the foundation of a judgment or judicial decree, is prima facie evidence of the matters stated even as against persons not parties to the proceeding. This principle applies to such matters as insanity inquests, coroners' verdicts, surveys, inventories and appraisements."**

It is submitted therefore that giving the Statute of Nevada (Section 7550) its ordinary meaning there is nothing there which requires the testimony of a witness at a coroner's inquest to be taken in the form of a deposition; nothing which requires that the testimony given by a witness be read over to him, much less is there anything in the statute which requires a witness to subscribe his testimony. The duty imposed upon the coroner is mandatory: **He shall reduce the testimony to writing and file it without delay!** The law "conclusively presumes" that he did his duty; and, in the instant case, that presumption was fully sustained by the production of the coroner's record from the proper archives. No question was ever made regarding the regularity of the proceedings of the coroner; on the contrary, both parties at the

trial of this action constantly used and referred to that transcript, and under those circumstances it would be an idle thing to call any witnesses to identify the record. That it was the best evidence is sustained by the authorities above cited.

Counsel again expresses regret in adding to the labors of the Court; but feels impelled by a sense of duty to the Court to make this effort to correct what is earnestly maintained to have been an error in the disposition of this case. Counsel is as anxious as the Court can be that its conclusions should be sound and free from any just criticism, and therefore respectfully urges the Court to grant a rehearing on the point involved in its opinion filed herein on April 1, 1918.

Respectfully submitted,

THOMAS E. KEPNER,  
*Attorney for Defendant in Error.*

THIS IS TO CERTIFY: That the opinion of the undersigned, Counsel for Defendant in Error, the foregoing Petition for Rehearing is well-founded in point of law, and that it is not interposed for delay.

Reno, Nevada, April 22, 1918.

THOMAS E. KEPNER,  
*Attorney for Defendant in Error.*

United States  
Circuit Court of Appeals 6  
For the Ninth Circuit.

---

S. C. ADAMS,

Appellant,

vs.

YUKON GOLD COMPANY, a Corporation, W. A.  
DIKEMAN, JOHN BEATON, THOMAS  
P. AITKEN, RAE B. CARTER, P. F.  
STIMLEY and TOM DAVIS,  
Appellees.

---

Transcript of Record.

---

Upon Appeal from the United States District Court for  
the Territory of Alaska, Fourth Division.

---

FILED  
DEC 7 - 1917  
P. M. MCHENRY, CLERK





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

S. C. ADAMS,

Appellant,

vs.

YUKON GOLD COMPANY, a Corporation, W. A.  
DIKEMAN, JOHN BEATON, THOMAS  
P. AITKEN, RAE B. CARTER, P. F.  
STIMLEY and TOM DAVIS,

Appellees.

**Transcript of Record.**

Upon Appeal from the United States District Court for  
the Territory of Alaska, Fourth Division.



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Affidavit of Service of Suggested Amendments to Proposed Bill of Exceptions.....	119
Answer of Defendants Yukon Gold Company, a Corporation, W. A. Dikeman and John Beaton .....	6
Assignment of Error.....	122
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions.....	33
Bond on Appeal.....	129
Certificate of Clerk U. S. District Court to Tran- script of Record .....	131
Citation on Appeal .....	132
Complaint .....	3
Decree .....	32

## DEPOSITION ON BEHALF OF DEFEND- ANT:

ROWSON, WALTER .....	109
----------------------	-----

## EXHIBITS:

Plaintiff's Exhibit 1—Placer Location No- tice .....	40
Plaintiff's Exhibit 2—Deed, William Lang to S. C. Adams .....	42



Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit 3—Letter Dated January 13, 1913, The Yukon Gold Company to S. C. Adams.....	44
Plaintiff's Exhibit 4—Placer Location Notice .....	45
Defendant's Exhibit "A"—Map Showing Prospector and Mohawk Conflicting Claims on Otter Creek .....	77
Findings of Fact and Conclusions of Law.....	24
Hearing on Defendant's Amendments to Proposed Bill of Exceptions .....	121
Names and Addresses of Attorneys of Record..	1
Notice of Hearing of Settlement of Bill of Exceptions .....	120
Opinion .....	11
Order Setting Time for Filing and Serving Bill of Exceptions .....	116
Order Settling Bill of Exceptions.....	121
Petition for Appeal .....	128
Plaintiff's Proposed Findings of Fact and Conclusions of Law.....	18
Praecept for Transcript of Record.....	2
Reply .....	9
Stipulation Extending Time for Filing of Proposed Bill of Exceptions, etc.....	117
Stipulation Extending Time to May 1, 1917, to Prepare etc., Bill of Exceptions.....	116
Stipulation Re Deposition of Walter Rowson, for Defendant .....	109
Stipulation Re Printing of Record.....	1

## Index.

## Page

Suggested Amendments to Proposed Bill of Ex- ceptions Filed by Plaintiff .....	118
---	-----

### TESTIMONY ON BEHALF OF PLAIN- TIF:

ADAMS, S. C. ....	34
Cross-examination .....	50
Redirect Examination .....	71
Recross-examination .....	75
KREUTZINGER, CHARLES .....	104
Cross-examination .....	105

### TESTIMONY ON BEHALF OF DEFEND- ANTS:

AUSTIN, E. A. ....	79
Cross-examination .....	87
Redirect Examination .....	91
BEATON, JOHN .....	91
Cross-examination .....	95
Redirect Examination .....	98
Cross-examination .....	100
Redirect Examination .....	103
CHITTICK, A. A. (In Surrebuttal) .....	110
Cross-examination .....	113
RILEY, J. E. ....	103
Cross-examination .....	103
Redirect Examination .....	104



**Names and Addresses of Attorneys of Record.**

E. COKE HILL, Attorney for Plaintiff and Appellant, Ruby, Alaska.

HENRY RODEN, Juneau, Alaska, and

JOHN L. MCGINN, 76 Poplar Ave., San Mateo, California, Attorneys for Defendants and Appellees.

---

*In the District Court for the District of Alaska,  
Fourth Division.*

No. 32—R.

S. C. ADAMS,

Plaintiff,

vs.

YUKON GOLD COMPANY, a Corporation, et al.,  
Defendants.

**Stipulation Re Printing of Record.**

It is hereby stipulated between the attorneys for the parties respectively that in printing the record in this cause for use in the Circuit Court of Appeals, all captions shall be omitted after the title of the cause has been printed and the words "Caption and Title" and the name of the paper or document shall be substituted therefor; also that indorsements and file-marks may be omitted and the word "indorsement" printed in lieu thereof on all papers except the bill of exceptions, the petition for appeal and allowance thereof and the assignment of errors, and the record in the appellate court.



Done at Ruby, Alaska, August 30th, 1917.

E. COKE HILL,  
Attorney for Plaintiff.

HENRY RODEN,  
Attorney for Defendants.

Filed in the District Court, Territory of Alaska,  
4th Div. Sep. 13, 1917. J. E. Clark, Clerk. By  
Grace Fisher, Deputy. [1\*]

---

[Caption and Title.]

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare and certify a copy of the  
record in this action as follows:

1. The complaint.
2. The answer.
3. The reply.
4. Bill of exceptions containing the evidence.
5. Decision.
6. Plaintiff's proposed findings of fact.
7. Findings of fact and conclusions of law.
8. Decree.
9. All stipulations as to time for filing bill of exceptions.
10. Order granting time for filing bill of exceptions—1/407.
11. Defendants' proposed amendments to bill of exceptions.
12. Order upon hearing for settlement of bill of exceptions—1/503.

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

13. Notice of calling bill of exceptions up for settlement.
14. Order settling bill of exceptions.
15. Original map, being Defts. Ex. "A."
16. Petition for appeal, with allowance.
17. Assignment of errors.
18. Bond on appeal.
19. Citation.
20. Certificate to transcript.
21. Copy of following stipulation.

E. COKE HILL,  
Attorney for Plaintiff.

It is hereby stipulated between counsel for the parties that the above shall constitute the record in the above-entitled cause and contains all the papers, exhibits and other papers necessary for a hearing in the above-entitled cause.

Done August 31st, 1917.

E. COKE HILL,  
Attorney for Plaintiff.  
HENRY RODEN,  
Attorney for Defendant.

[Indorsement.] [2]

---

[Caption and Title.]

**Complaint.**

Comes now the plaintiff and for cause of action against the defendants alleges:

1.

That the defendant Yukon Gold Company is a corporation organized and existing under and by

virtue of the laws of the State of Maine, and doing business in Alaska.

## 2.

That by reason of good and subsisting locations thereof as placer mining ground plaintiff is the owner of and in possession of the following described real property situated in the District of Alaska, Otter Recording District, Fourth Judicial Division, to wit: That certain piece or parcel of land known as "Anaconda No. 2" and "Anaconda Fraction" situated on the left limit of Otter Creek, said Anaconda No. 2 being bounded as follows: Commencing at initial stake which is at the southeasterly corner of this claim and which is at the same place as stake No. 2 of the Prospector Association and the northeasterly corner of the Mohawk Association, which said place is a well-known spot marked with permanent stakes, and running thence in a northerly direction one hundred and twenty-five feet (125 ft.) to stake No. 2, and thence in a westerly direction five thousand two hundred and eighty feet (5,280 ft.) to stake No. 3, and thence in a southerly direction one hundred and twenty-five feet (125 ft.) to stake No. 4, and thence in an easterly direction five thousand, two hundred and eighty feet (5,280 ft.) to the place of beginning. Each of said corners are marked with large wooden stakes driven securely into the ground and marked with the name of the claim and number of the post.

The "Anaconda Fraction" commences at the same point and is entirely [3] included within the boundaries of the "Anaconda No. 2" claim, its first

line being only one hundred and twenty (120) feet along the first course of the "Anaconda No. 2" to a post, and its second course running thence in a westerly direction twenty-six hundred and forty feet (2,640 ft.) and thence in a southerly direction one hundred and twenty feet (120 ft.) to post No. 4, and thence along the last course of the "Anaconda No. 2" in an easterly direction twenty-six hundred and forty feet (2,640 ft.) to the place of beginning. All corners of the "Anaconda Fraction" are marked by substantial wooden posts firmly set in the ground and marked with the name of the claim and the number of the post.

## 3.

The defendants and each of them claim some interest in said real property adverse to this plaintiff, the exact nature of which interest is to this plaintiff unknown.

## 4.

That said whatever claim the said defendants or either of them have to said real property is not valid and is without foundation, and is inferior to the ownership of this plaintiff,

WHEREFORE, this plaintiff, prays:

1. That the defendants and each of them be required to come into court and set up their or his said claim;

2. That the possession of this plaintiff and the title of this plaintiff to said real property be quieted as against the defendants and each of them, and,

3. For plaintiff's costs and disbursements in this



suit, and for such other and further relief as to the Court may seem meet and equitable.

E. COKE HILL and

ALFRED E. MALTBY,

Attys. for Plaintiff. [4]

United States of America,

District of Alaska,—ss.

S. C. Adams, being first duly sworn, says: I am the plaintiff above-named; I have read the foregoing complaint, know the contents thereof, and I believe it to be true.

S. C. ADAMS.

Subscribed and sworn to before me this 25th day of July, 1913.

[Seal]

ALFRED E. MALTBY,

Notary Public for Alaska.

My commission expires April 18, 1914.

I, E. Coke Hill, do hereby certify that I am attorney for plaintiff in the action named in the annexed copy of complaint, that I prepared said copy, and it is a full, true and complete copy of the original complaint in said action.

E. COKE HILL.

[Indorsement.] [5]

---

[Caption and Title.]

**Answer of Defendants Yukon Gold Company, a Corporation, W. A. Dikeman and John Beaton.**

Comes now the defendants Yukon Gold Company, a corporation, W. A. Dikeman, and John Beaton,

and answering plaintiff's complaint filed herein deny and allege as follows:

1. Answering paragraph 2 of said complaint these answering defendants deny that at the time of the commencement of this action plaintiff was the owner of or in possession of the real property described in his complaint, or any part thereof.

2. Answering paragraph 4 of said complaint these answering defendants deny their interest and claim to the property described in the complaint filed herein, is invalid, or that it is without foundation, or that it is inferior to the alleged ownership of said plaintiff.

For further answer and as an affirmative defense these answering defendants allege:

1. That ever since the 10th day of April, 1909, these defendants, together with their codefendants and their grantors, have been and now are the owners in fee, subject only to the paramount title of the United States, in the sole and exclusive possession and entitled to the sole and exclusive possession of that certain placer mining claim known and recorded as the "Prospector Association Claim," situate on the left limit of Otter Creek, Otter Precinct, Territory of Alaska.

2. That the said Prospector Association Claim within its exterior boundaries, contains that certain piece or parcel of land described in plaintiff's complaint as "Anaconda Fraction" and "Anaconda No. 2."

3. That plaintiff has no right, title, interest or

estate in or to said Prospector Association Claim or any part thereof. [6]

WHEREFORE defendants pray judgment that plaintiff is not entitled to the property described in his complaint or any part thereof; that he has no right, title, interest or estate therein or thereto; that these defendants are the owners, in possession and entitled to the possession of the premises described in their answer and that defendants recover their costs and disbursements herein.

HENRY RODEN,

Attorney for Defendants Yukon Gold Company, W.  
A. Dikeman and John Beaton.

United States of America,  
Territory of Alaska,—ss.

E. A. Austin, being first duly sworn, on his oath deposes and says: I am the agent of Yukon Gold Company, a corporation, one of the above-named defendants and the person designated by said corporation upon whom service of summons may be made; I have read the foregoing answer, know the contents thereof and that the same is true as I verily believe.

E. A. AUSTIN.

Subscribed and sworn to before me this 20 day of  
July, 1914.

[Seal]

HENRY RODEN,

Notary Public in and for the Territory of Alaska.

My commission expires March 23d, 1918.

Service of the above answer is hereby acknowledged this 21st day of July, 1914.

E. COKE HILL,  
Of Attys. for Plaintiff.

[Indorsement.] [7]

---

[Caption and Title.]

**Reply.**

Comes now the plaintiff and replying to defendants' answer, denies and alleges as follows:

1.

Denies each and every allegation contained in paragraphs 1, 2, and 3 of defendants' "further answer" and "affirmative defense."

As a further and affirmative reply plaintiff alleges:

1.

That the boundaries of the "Prospector Association Claim," referred to in paragraphs 1 and 2 of said affirmative answer of the said defendants as marked upon the ground, contained and at the time of the commencement of this action still contained more than one hundred and sixty acres, to wit, one hundred and eighty-seven acres more or less, and that defendants, with full knowledge of said excess over and above one hundred and sixty acres, neglected and refused to cast off said excess and that as to said excess any claim that defendants may have had as to ground within said Prospector location was null and void, and that after waiting a reasonable time for defendants to cast off said excess,



plaintiff located fifteen acres, more or less, of the said excess in the locations alleged in plaintiff's complaint as placer mining claims.

As a second and further affirmative reply, plaintiff alleges:

1.

That the said "Prospector Association Claim" was fraudulently located by the original locators thereof, for the reason that there was an understanding and agreement between certain of the persons whose names were used as locators thereof, that in consideration for their being named as [8] locators in said claim they would deed to defendant John Beaton and defendant W. A. Dikeman an undivided one-half of each of their interests in said claim as shown by the said location notice, and that thereafter and in accordance with said agreement they did so deed their said undivided half interests to the said defendants W. A. Dikeman and John Beaton, whereby the said defendants W. A. Dikeman and John Beaton each received more than undivided one-eighth ( $\frac{1}{8}$ ) interest in said claim.

A. E. MALTBY and  
E. COKE HILL,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

S. C. Adams, being first duly sworn, on oath says: I am the plaintiff above named, I have read the foregoing reply, know the contents thereof and the same is true as I verily believe.

S. C. ADAMS.

Subscribed and sworn to before me this 27th day of July, 1914.

[Seal]

M. L. PETERSON,  
Notary Public for Alaska.

My commission expires Aug. 17, 1914.

Service of above reply *in* hereby acknowledged.

HENRY RODEN,  
Atty. for Defts.

[Indorsement.] [9]

---

[Caption and Title.]

**Opinion.**

The trial of this action was begun at the special July, 1915, term of court at Iditarod on the — day of July, before the court, without a jury. Testimony was introduced by both the plaintiff and the defendants, and on the — day of July, upon stipulation of counsel, the trial was continued to the special June, 1915, term of court at Ruby adjourned to the — day of August, 1915. An order was duly entered transferring the cause to the Ruby calendar, and trial of the action having been completed on the 16th day of August, the Court reserved decision.

The plaintiff in his complaint alleges that by reason of good and subsisting locations thereof as placer mining ground, he is the owner of and in possession of the Anaconda Fraction Placer Mining Claim, 120 feet in width by 2,640 feet in length, and of the Anaconda Fraction Number Two Placer Mining Claim, 125 feet in width by 5,280 feet in

length; that said Anaconda Fraction Number Two Placer Mining Claim includes within its boundaries all of said Anaconda Fraction Placer Mining Claim.

Answering plaintiff's complaint, defendants deny plaintiff's ownership of the "Anaconda Fraction" and "Anaconda Fraction No. 2"; allege that all the ground embraced by said "Anaconda Fraction" and said "Anaconda Fraction No. 2" is within the boundaries of the Prospector Association Placer Mining Claim, of which the defendant Yukon Gold Company is the lessee in possession [10] and co-owner and that the other defendants are owners of undivided interests and lessors of the Yukon Gold Company.

In reply, plaintiff denies the affirmative defense of defendants; alleges the Prospector Association Placer Mining Claim to be greatly in excess of 160 acres; failure of defendants to cast off excess within reasonable time after notice; and that the said "Prospector" Association Claim was fraudulently located by the original locators thereof.

By plaintiff's testimony it is shown that prior to the 23d day of May, 1911, plaintiff knew that the boundaries of the "Prospector" included more than 160 acres; that he had discovered gold-bearing gravel within the boundaries of the "Anaconda Fraction," and that on the 23d day of May, 1911, he placed stakes at the corners of the "Anaconda Fraction," blazed trees along its boundaries; in due time posted a notice of location on the premises and filed a copy of the same for record with the recorder of the Otter Precinct; that said "Anaconda Fraction"

was 120 feet in width by 2,640 feet in length. That subsequently and during the year 1913 plaintiff placed stakes at the corners of and blazed trees along the boundaries of the "Anaconda Fraction No. 2," including all the ground embraced in the "Anaconda Fraction"; in due time posted notice of location and filed a copy of the same for record with the recorder of the Otter Mining District. That said "Anaconda Fraction No. 2" was 125 feet in width by 5,280 feet in length. Plaintiff further testified that the assessment work had been done for the years 1912, 1913 and 1914.

It is shown that the "Prospector Association Claim" was located in the year 1909 by eight persons, and by the location notice thereof was intended to be 1,320 feet in width by 5,280 feet in length and to contain 160 acres; that as originally [11] marked upon the ground it contained 187.03 acres and was therefore in excess by 27.03 acres.

As is generally the case, the boundaries of the "Prospector Association Claim," as marked upon the ground, did not meet at right angles. The south boundary was 5,528 feet in length, the north boundary was 5,955.9 feet in length; the east boundary was not in a straight line, and from the center stake to the south boundary corner is a distance of 687.5 feet, and to the north boundary corner is 716.8 feet, the center stake being westerly of a straight line connecting the S. E. corner and the N. E. corner of the claim; the west boundary was 1,535.2 feet in length. The southerly boundary was also the northerly boundary of the Mohawk Association Claim.



The survey does not show the Anaconda Fraction No. 2 exactly 125 feet in width by 5,280 feet in length. It is less than 5,280 feet in length, 130 feet in width on the easterly boundary, and 123 feet in width on its westerly boundary, and is in conflict with the "Prospector Association Claim," after casting off the excess of 27.03 acres on the westerly end, in the extent of 14.31 acres. The southerly boundary of the "Prospector Association Claim" is the southerly boundary of the "Anaconda Fraction No. 2."

The plaintiff Adams testified in substance that after having ascertained the Prospector Association Claim as stated to be in excess of 160 acres, he went to two of the co-owners of the claim and notified them of his intention to stake such excess; that they thereupon gave their consent to plaintiff to stake such excess from either end or side. It was shown that the remaining co-owners, some of whom were in the immediate vicinity, were not advised of the consent given by the two co-owners to Adams; that this act had by them neither been previously authorized nor subsequently ratified. Plaintiff contends that having entered under the permission thus extended, the remaining co-owners, being tenants in common, were bound by the act of their cotenants.

[12] I am satisfied that this contention cannot prevail.

Barson v. Mulligan, 16 L. R. A. (U. S.) 151.

O'Hanlon v. Ruby Gulch M. Co., 135 Pac. 913.

McKinley v. Peters, 3 Atl. 27.

Lindley on Mines, Vol. 3, 1950.

Town of Gold Hill v. Caledonia M. Company,  
14 Morrison M. R. 207.

Deep River Gold M. Co. v. Fox, 1 Morrison M.  
R. 301.

It is not charged that the original locators fraudulently included within the boundaries of the Prospector Association Claim an area greater than 160 acres. It must therefore be admitted that the location was made in good faith as to the area included.

“No entry for the purpose of location can be made on an existing mining claim which is excessive through honest mistake until notice of the excess has been given the locator and an opportunity afforded him to reduce his claim to legal size.”

Jones v. W. G. M. & T. Co., 177 Fed. 95, 29  
L. R. A. (U. S.) 392.

Nichols v. Lewis & Clark M. Co., 109 Pac. 846,  
28 L. R. A. (U. S.) 1029.

Divinvell v. Dyer, 7 L. R. A. (U. S.), note,  
page 850.

Zimmerman v. Funchion, 161 Fed. 859.

Waskey v. Hammer, 170 Fed. 31.

“A placer mining claim located in good faith is not wholly void because it exceeds 20 acres (an association placer claim 160 acres), but is void only as to the excess, which may be rejected from any portion the owner may select, and until he has been advised of the excess, and has had a reasonable time to make his selection, his possession extends to the entire claim, and another who goes upon it and makes a location

of any part is a trespasser, and his location a nullity and void for any purpose.”

*Jones v. W. G. M. & T. Co.*, 177 Fed. 95.

The plaintiff, it will be noted, claims the right to enter by virtue of permission extended to him by two of the co-owners to stake the excess from either side or end. Ordinarily one could not be heard to complain if having granted permission to stake [13] the excess the locator staked less than the excess. If the two co-owners were able to bind the other co-owners by such, permission the plaintiff, as in this case, would be required to stake such excess entirely on one side or on one end. This plaintiff fails to do. If he, by his staking, can give the original location another course, as he has attempted to do in this instance, then “to stake on either side or end” can be construed to mean a staking of excess in rectangular form anywhere in the original claim provided one boundary of the fractional location coincides with one boundary of the original location. One claiming the right to make entry of a placer mining claim the boundaries of which contain an area in excess of the amount allowed by law, under permission of the owners thereof to stake the excess, should first determine the amount of such excess and stake the same in such manner that the original location thus reduced in area will not contain an additional course.

One of the defendants herein, the Yukon Gold Company, after this action was instituted, in the winter of 1914 surveyed the Prospector Association Claim, cast off the excess of 27.03 acres at the lower

end, and established a new boundary accordingly.

Section 2331 of the Revised Statutes provides that claims upon unsurveyed public lands shall conform "as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys."

Defendants' Exhibit "A" is a map showing the conflict area of the Prospector Association Claim with the "Anaconda Fraction" and the "Anaconda Fraction No. 2," also the excess area cast off by establishing a new lower boundary for the Prospector Association Claim. It also shows that the Prospector Association Claim is bounded on the upper, or easterly, end by the "K. P. M." claim, and on the southerly side by the "Mohawk Association Claim" and the "Lucky Fraction Claim." No claim is shown to join the [14] Prospector Association Claim on the westerly, or lower end.

If the decision of the Land Office is to be followed in *Re Snowflake*, 37 L. D. 250, "as near as practicable" has a well defined meaning. It is laid down in this decision that the Land Department is unwilling to approve "shoe string" claims or those of irregular shapes unless prior locations render such fractional locations necessary in order to appropriate unclaimed areas.

Plaintiff asks the Court to validate the "Anaconda No. 2," being a fractional claim, 5,280 feet in length by 125 feet in width. The necessity for making a location in this form is not shown; on the other hand the evidence clearly shows that the plaintiff under section 2331 Revised Statutes could have



located the excess of the Prospector Association Claim finally cast off, and such location would have been "as near as practicable with the United States system of public land surveys."

Lindley on Mines, 3d Edition, vol. 2, sec. 448.

While the Courts are not bound by the decisions of the Land Department, still the Courts should consider them and give them full force and effect in proper cases.

Hanson vs. Craig, 170 Fed. 62.

Findings of fact and conclusions of law in accordance with the views herein expressed, together with a decree dismissing the action, may be prepared and submitted. Since defendants reside at Iditarod and the plaintiff resides at Ruby, the defendants may have sixty days to prepare, serve and file their findings of fact and conclusions of law, and the plaintiff may have sixty days after service of the same to prepare and file any proposed amendments or objections.

Dated Fairbanks, Alaska, November 9th, 1915.

CHARLES E. BUNNELL,  
District Judge. [15]

[Indorsement.] [16]

---

[Caption and Title.]

**Plaintiff's Proposed Findings of Fact and  
Conclusions of Law.**

The above-entitled cause having come regularly on for trial, the plaintiff appearing in person and by his attorney, E. Coke Hill, and the defendants ap-

pearing by their attorneys Henry Roden and E. M. Stanton, and testimony having been introduced on the part of plaintiff and defendants, and the Court being fully advised, it makes the following findings of fact:

1. That on or about the 8th day of June, 1909, J. Morrow, Ira Van Orsdale, Wm. Stemley, C. C. Chitic, Tom Davis, Jim Muckler, Wm. Pillar and L. Blackburn, located that certain placer mining claim, situated Otter Creek, Otter Recording Precinct, Territory of Alaska, and known as the Prospector Association, by making a discovery of gold within its boundaries, marking its boundaries so they could be readily traced upon the ground and posting and recording a location notice.

2. That in their said location notice the said locators of the said Prospector Association described said association as containing one hundred and sixty acres and being five thousand two hundred and eighty feet long by thirteen hundred and twenty feet wide.

3. That the area contained within the boundaries of said claim as marked upon the ground contained in fact one hundred and eighty-seven (187) acres. That the initial post of said Prospector claim was placed by the locators thereof on the western end of said claim and that end line was approximately as much longer than the call for the width of the claim as the width of [17] Anaconda Fraction hereinafter referred to. That Prospector claim extended, as originally staked, a little over a mile from the western end to the eastern end and

that the eastern end of said claim was on a rocky hillside upon which no gold has ever been found. That the western end of said claim covers the alluvial plain of Flat and Otter Creeks.

4. That in April, 1911, S. C. Adams, the plaintiff in this action, had measured the Prospector Association and found it excessive, and on or about the first of April, 1911, he told Jim Muckler and C. C. Chittic that the Prospector claim was in excess of 160 acres and asked if they had any objection to his staking the excess and was told by them that if it was excessive he could stake the excess off whatever side or end he wished. That at the time of said conversation both Muckler and Chittic were owners of an undivided interest in said Prospector Association, and Chittic was in possession thereof under lease.

5. That hereafter and on or about the 23d day of May, 1911, the plaintiff herein and one Wm. Lang went upon the northern end of the Prospector Association and discovered gold within the boundaries of the Anaconda Fraction, and marked the boundaries of the said Anaconda Fraction so the same could be readily traced upon the ground and posted notice of location thereof and caused said notice of location to be recorded in the office of the recorder of the recording precinct wherein the ground included in the Anaconda Fraction was situated. That the said Anaconda Fraction was marked upon the ground was 120 feet wide and extended 2,640 feet along and within the northern boundary of said Prospector Association.

6. That between the time when plaintiff measured the Prospector Association and at the time when he staked the Anaconda Fraction, some of the owners of the Prospector were not in the vicinity of the Prospector and plaintiff did not give actual notice [18] of his location of the Anaconda Fraction to any of said owners except Muckler and Chittic, and since said location of the Anaconda Fraction in May, 1911, some of the owners of said Prospector Association have never resided in the vicinity of of said Prospector Association.

7. That after the location of the Anaconda Fraction plaintiff by mesne conveyance acquired the interest of Wm. Lang therein.

8. That plaintiff performed \$100.00 worth of work within the boundaries of Anaconda Fraction during each of the years 1912, and 1913 and maintained his boundary markings.

9. That at the time of the commencement of this action the defendant Yukon Gold Company, by a series of mesne conveyances had acquired the titles of C. C. Chittic, S. Blackburn, J. Morrow, and half of the original interest of Van Orsdale and William Pillar, and that all of said interests save the half interest of Van Orsdale were acquired prior to the location of Anaconda No. 2 hereinafter referred to. That prior to the commencement of this action and prior to the location of said Anaconda No. 2, defendant W. A. Dikeman had acquired one-half of the original interests of J. Morrow, Ira Van Orsdale and P. F. Stimley by mesne conveyances from them, and defendant John Beaton had acquired by mesne



conveyances one-half of the original interests of James Muckler, Wm. Pillar and Tom Davis in said Prospector Association; Rae B. Carter had acquired by mesne conveyance from James Muckler, one-half of his original interest and Tom Davis still retained one-half of his original interest therein.

10. That, during the month of December, 1912, the defendant Yukon Gold Company served notice upon the plaintiff who was then working on the Anaconda Fraction to forbear and refrain from trespassing upon the Prospector Association. [19]

11. That during the month of August, 1912, plaintiff and the manager of the defendant Yukon Gold Company had a conversation at which plaintiff attempted to sell to Yukon Gold Company the Anaconda Fraction and pointed out to said manager on a map showing the Prospector and Mohawk claims, the location of Anaconda Fraction.

12. That on the 19th day of July, 1913, plaintiff went upon the Prospector Association and marked the boundaries of a placer mining claim by him designated as "Anaconda No. 2." That he marked said boundaries so the same could be readily traced upon the ground, made a discovery of gold therein and posted a location notice and caused a copy thereof to be recorded in the recording office for the recording precinct in which said ground was located. That the said Anaconda No. 2 was located over and included within its boundaries the Anaconda Fraction, and lay along the northern end of the Prospector Association and within its boundaries and is 125 feet north and south and 5,280 feet east and west.

13. That at the time of the location of Anaconda Fraction and Anaconda No. 2, the Prospector claim was a valid subsisting placer mining location, and said Anaconda Fraction and Anaconda No. 2 were made as locations of a portion of the excess area of said Prospector Association.

14. That at the time of the commencement of this action the plaintiff herein was in the actual possession of the ground covered by the Anaconda Fraction and Anaconda No. 2 locations, and defendants were asserting title to and claiming an interest in said ground adverse to this plaintiff.

15. That defendants did not cast off any of the excess contained in said Prospector location as originally marked upon the ground until after the commencement of this action. [20]

16. That the Prospector Association, as originally marked upon the ground adjoined the Mohawk Association along the northern end line of the Prospector Association, and said Mohawk Association was at the time of the location of Anaconda Fraction and Anaconda No. 2 a valid and subsisting mining location.

Done this —— day of August, 1916, at Ruby, Alaska, in open court.

---

District Judge.

### CONCLUSIONS OF LAW.

From the foregoing *conclusions* of fact the Court finds as a conclusion of law that the plaintiff made a good and valid location of "Anaconda Fraction" and "Anaconda No. 2" as placer mining claims and

is entitled to a decree quieting his title thereto.

Done this — day of August, 1916, at Ruby, Alaska, in open court.

---

District Judge.

Service of the above proposed findings and conclusions at Ruby, Alaska, by receipt of copy is hereby acknowledged this 11th day of August, 1916.

HENRY RODEN,

Attorney for Answering Defendants.

[Indorsement.] [21]

---

[Caption and Title.]

**Findings of Fact and Conclusions of Law.**

This cause having come regularly on for trial, the plaintiff appearing in person and by his attorney, E. Coke Hill, Esq., and defendants Yukon Gold Company, W. A. Dikeman, and John Beaton appearing by their attorneys Henry Roden and E. M. Stanton, and testimony having been introduced on the part of plaintiff and defendant, and the Court being fully advised and having heretofore rendered its decision in writing, now makes the following findings of fact:

1st. That on or about the 8th day of June, 1909, J. Morrow, Ira Van Orsdale, Wm. Stemley, C. C. Chittie, Tom Davis, Jim Uckler, Wm. Pullar and L. Blackburn located that certain placer mining claim designated in the pleadings herein as the "Prospector Association Claim" situate on Otter Creek, Otter Precinct, Territory of Alaska, by marking the boundaries thereof so that the same could be readily

traced, by making a discovery of gold within the exterior boundaries of said claim, by posting notice of location upon the said premises and by causing said notice of location to be recorded in the office of the recorder of the mining precinct within which said premises were situate.

2d. That in their said location notice the said locators of said Prospector Association Claim claimed a piece or parcel of land 5,280 feet long by 1,320 feet wide, making a total area of one hundred and sixty (160) acres.

3d. That the area contained within the said boundaries of said Prospector Association Claim as marked upon the ground, contained in fact more than one hundred and sixty acres, to wit, one hundred and eighty-seven acres.

That the boundaries of the said Prospector Association Claim as marked upon the ground did not meet at right angles; that the south boundary was 5,528 feet in length; the north boundary was 5,955.9 feet in length; the east boundary was not in a straight line, and from the center stake to the south boundary [22] corner is a distance of 687.5 feet and to the north boundary corner is 716.8 feet, the center stake of said claim being westerly of a straight line connecting the S. E. corner and the N. E. corner of the claim; the west boundary was 1,635.2 feet in length. The south-erly boundary was also the northerly boundary of the Mohawk Association Claim.

4th. That in April, 1911, plaintiff Adams measured the said Prospector Association Claim and found the same to be in excess of 160 acres; that there-



after said plaintiff went to Jim Muckler and C. C. Chittic, two of the co-owners of the said Prospector Association Claim and notified them of his intention to stake such excess; that the said two co-owners informed said plaintiff that if the said Prospector Association Claim contained an excessive area to stake such excess from either end or side of said claim. That some of the co-owners in said Prospector Claim were well known in the vicinity where said premises are situate and were living in close proximity thereto; that said co-owners were not notified by anyone nor were they advised of the fact that said claim contained an excessive area; they were never informed or advised of the instructions or directions given by their said two co-owners Muckler and Chittic to plaintiff to take up such excess at either end or side of said claim, and their said act had been by them neither previously authorized nor subsequently ratified. That some of the co-owners in said Prospector Claim resided at a distance therefrom and they were never aware of the fact that said claim contained in excess of 160 acres and they were never advised or informed of the directions given by said Muckler and Chittic to locate such excess at either end or side of this act had been by them neither previously authorized nor subsequently ratified.

5th. That the excessive area contained in said Prospector Association Claim was taken in through the honest mistake of and without any intention on the part of said locators or any of them, to acquire by said location a placer mining claim in excess of 160 acres or an interest in such placer mining claim, ex-

ceeding twenty acres for each single locator.

6th. That on the 23d day of May, 1911, while said Prospector Association Claim was a valid, subsisting mining location, and while the locators [23] thereof and their grantees had no notice or knowledge that said placer claim contained an area in excess of 160 acres, except the said locators Muckler and Chittie, and without the knowledge or consent of said locators except as to said Muckler and Chittie, plaintiff herein, entered within the exterior boundaries of said Prospector Association Claim and pretended to make a placer location within the boundaries thereof and called the same "Anaconda Fraction." That said fraction, as claimed in the notice of location, was 120 feet in width, by 2,640 feet in length; that as marked upon the ground the said Anaconda Fraction lies wholly within the exterior boundaries of the said Prospector Association Claim and *noe* of its boundaries cover or adjoin any boundary line of said Prospector Association Claim, and the said Anaconda Fraction is not located either at one end or one side of said Prospector Claim. That the boundaries of said Anaconda Fraction were marked upon the ground so that the same can be readily traced and a discovery of gold was made within the same by said plaintiff and his colocator Lang, and notice of location thereof was duly recorded in the office of the recorder for Otter Precinct, that being the Precinct within which said premises are situate.

7th. That on the 19th day of July, 1913, and while the said Prospector Association Claim was a valid subsisting placer mining claim, and while the

locators thereof and their grantees, except the said locators Muckler and Chittie, had no notice or knowledge of the fact that said Prospector Claim contained an area in excess of 160 acres plaintiff herein entered within the exterior boundaries of said Prospector Association Claim and pretended to make a placer mining location within said lines, and called the same "Anaconda Fraction Number Two." That plaintiff marked the boundaries thereof so that the same could be readily traced, made a discovery of gold within said boundaries and caused the notice of location thereof to be recorded in the office of the recorder within whose precinct said premises are situate. That in his notice of location, plaintiff claims a piece or parcel of land 125 feet in width by 5,280 feet in length. As marked upon the ground said Anaconda Fraction Number Two is 5,374 feet in length [24] 130 feet in width at the easterly boundary and 125 feet in width on its westerly boundary, and lies wholly within the exterior boundary lines of said Prospector Association Claim. That the southerly boundary line of said Anaconda Fraction Number Two is not coextensive with the southerly boundary line of said Prospector Claim and the westerly end line of said Anaconda Fraction Number Two is 254 feet easterly from the easterly end line of said Prospector Claim. Said Anaconda Fraction Number Two embraced all of said Anaconda Fraction and is in conflict with said Prospector Claim, after casting off the excess on the westerly end, in the extent of 14.31 acres.

8th. That said plaintiff, in making the said two locations, did not stake or locate them, or either of

them, on either end or side of said Prospector Claim, as he was requested to do by said Muckler and Chittie.

9th. That at the time of the location of said Anaconda Fraction and said Anaconda Number Two, said Prospector Association was a valid subsisting mining location and said pretended locations were intended to take up a portion of the excess area contained in said Prospector Claim.

10th. That it was practicable for plaintiff to locate and stake the excess area contained within the boundaries of said Prospector Claim in a more compact form than the form given said Anaconda Fraction and said Anaconda Fraction Number Two, and the configuration of the land embraced within the exterior boundaries of said Prospector Association Claim did not make it impracticable to locate such excess in a more compact form than was done in the pretended locations of said two Anaconda Fractions.

11th. That at the time of the commencement of this action plaintiff was in possession of said Anaconda Fraction and said Anaconda Fraction Number Two.

12th. That at the time of the commencement of this action defendant Yukon Gold Company had acquired the titles of C. C. Chittie, S. Blackburn, J. Morrow and one-half of the interest of Van Orsdale and Wm. Pillar. [25] Defendant Dikeman had acquired one-half of the interest of J. Morrow, Van Orsdale and P. F. Stemley, and defendant Beaton had acquired one-half of the interest of Jim Muckler, Wm. Pillar and Tom Davis.



13th. That the locators and their grantees of said Prospector Association Claim, except said Muckler and Chittie, did not acquire notice of the fact that said claim contained an area in excess of 160 acres until after the commencement of this action; that thereafter they caused said Prospector Association Claim to be surveyed and upon ascertaining that said claim contained in excess of one hundred and sixty acres, made an amended location thereof by casting off such excess at the westerly end of said claim and by drawing in their lines and stakes, so that the area contained within the boundaries of said Prospector Association Claim as amended contained 160 acres and no more, and caused an amended location notice to be posted upon said premises, and caused said amended location notice to be recorded in the office of the recorder in whose precinct said premises are situate.

And from the foregoing findings of fact the Court makes the following conclusions of law.

1st. That at the time plaintiff entered within the exterior boundary lines of said Prospector Association Claim and pretended to locate said Anaconda Fraction and also at the time said plaintiff entered within said boundary lines and pretended to locate said Anaconda Fraction Number Two, said Prospector Association Claim was a valid, subsisting mining location, and plaintiff's entry thereon and making said pretended mining locations gave him no right, title, interest or estate in or to any part of the area contained within the said boundaries of said Prospector Association Claim, and the pretended loca-

tions of said Anaconda Fraction and said Anaconda Fraction Number Two were and are null and void.

2d. That at the time of the commencement of this action defendants herein were, and they now are, the owners in fee of the premises described in their answer, to wit: The Prospector Association Claim, situate on Flat Creek, Otter Precinct, Alaska, as originally staked and located by them [26] less the excess area contained within the original boundary lines of said Prospector Association Claim, and as said Prospector Claim is now marked upon the ground and described in the amended location notice thereof; and the defendants then had, they now have, and they were then and they now are, entitled to the sole and exclusive possession of the said premises; that the plaintiff had not at the time of the commencement of this action and had not now any right, title, interest or estate therein, or in or to any part thereof, nor the right to the possession thereof, or to any part thereof.

3d. That the defendants Yukon Gold Company, W. A. Dikeman and John Beaton are entitled to the relief prayed for in their answer, filed in this cause.

Done at Ruby, Alaska, this 16th day of August, 1916.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 1, page 401.

[Indorsement.] [27]

[Caption and Title.]

**Decree.**

Be it remembered that upon this 16th day of August, 1916, this cause came on for hearing upon the motion of defendants for judgment and decree; and the Court, having heretofore tried this cause and made and filed its decision herein in favor of the said defendant and having heretofore made and filed its findings of fact and conclusions of law;

IT IS NOW ORDERED, ADJUDGED AND DECREED that plaintiff is not the owner, nor entitled to the possession of the property described in his complaint herein as Anaconda Fraction Placer Mining Claim and Anaconda Fraction Number Two Placer Mining Claim, situate at the mouth of Flat Creek, Otter Precinct, Territory of Alaska, nor of any part thereof; and has no right, title nor interest therein, and was not such owner and had no right, title nor interest in said property, or any part thereof, at the time of the commencement of this action; that at the time of commencement of this action the defendants herein were the owners in fee of the Prospector Association Claim, situate on said Flat Creek in said Otter Precinct, Alaska, within the exterior boundaries of which said Anaconda Fraction Mining Claim and said Anaconda Fraction Number Two Mining Claim are situate, and have their right to and were entitled to the sole and exclusive possession of said above-described premises and the whole thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by this

action, and that said plaintiff's cause be, and the same hereby is dismissed and that the defendants Yukon Gold Company, W. A. Dikeman and John Beaton recover their costs and disbursements, taxed at \$——— herein expended.

Dated at Ruby, Alaska, this 16th day of August, 1916.

CHARLES E. BUNNELL,

District Judge. [28]

Entered in Court Journal No. 1, page 406.—  
RUBY.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 16, 1916. J. E. Clark, Clerk. By Thos. J. De Vane, Deputy. [29]

---

[Caption and Title.]

**Bill of Exceptions.**

The above-entitled cause being at issue came regularly on for trial on the 13th day of July, 1913, at Iditarod, Alaska, before Honorable CHARLES E. BUNNELL, District Judge, there being then and there present E. Coke Hill, attorney for plaintiff, and Henry Roden and E. M. Stanton, attorneys for defendants.

S. C. Adams, the plaintiff, being first duly sworn, testified as follows: [30]



**Testimony of S. C. Adams, in His Own Behalf.**

S. C. ADAMS, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

**Direct Examination.**

(By Mr. HILL.)

Q. What is your name?      A. S. C. Adams.

Q. How old are you?      A. Thirty-nine.

Q. How long have you been in Alaska?

A. Since 1907.

Q. In what capacity did you come to Alaska?

A. As manager of the Alaska Mercantile Company.

Q. Where?      A. At Nome, Alaska.

Q. Was that the Ames Company?

A. Rosena had taken over the Ames Company, and I went up there to take it over and adjust it.

Q. How long did you remain in Alaska with Mr. Rosena?      A. About fifteen months.

Q. Did you do any mining in the Nome country?

A. Yes, sir.

Q. When did you come here?

A. I came here in December, 1910—the latter part of December.

Q. Where did you mine in the Nome country?

A. On Flat Creek, back of—known as the Senate Creek District. I had a lay on a piece of ground there.

Q. Where did you live after you came here?

A. I lived out at Flat Creek.

Q. In the town of Flat?

(Testimony of S. C. Adams.)

A. In the town of Flat. Yes, sir. [31]

Q. Do you know where the Prospector Association was situated at that time? A. Yes, sir.

Q. Did you ever locate any portion of the Prospector? A. I did.

Q. When did you first make up your mind to locate a portion of the Prospector?

A. It was some time in the latter part of March or first of April in 1911.

Q. What, if anything, did you do when you made up your mind to locate that portion of the Prospector?

A. I had learned that Mr. Cash Chittie and Jim Muckler had an interest in the Prospector. And one afternoon in Conley's Saloon, in the presence of William Lang, Star Ballard and Charley Krutzinger, Mr. Cash Chittie and Mr. Jim Muckler were in the office and I told them that I wished to stake a fraction off the Prospector, as I considered it too large, and they informed me that if it was too large,—in excess of 1,320 feet by 5,280 feet,—that I could stake a fraction at either side or end that I wished.

Q. Let me get that right. What did they say to you?

A. They said that I could stake a fraction at either side or end.

Q. Not that. What I meant—something about "too large."

A. If it was in excess—(interrupted).

Q. I didn't understand that.

A. (Continuing.) —of 1,320 feet by 5,280, or 160

(Testimony of S. C. Adams.)

acres, as all they claimed was 160 acres.

Q. Who told you that?

A. Mr. Chitic and Mr. Muckler. [32]

Q. How did Chitic and Muckler come to tell you that?

A. Mr. Chitic had been prospecting there, and Mr. Muckler lived up around Otter, and I told them the claim was too big, and they said if it was too big I could stake that fraction.

Q. What relation did they have to the claim?

A. They claimed they had an interest in the Prospector, and Mr. Chitic I believe at that time had a lay.

Q. What did you do then?

A. Along in May, I believe it was the 22d of May, I measured the Prospector, William Lang and I. We hired a man by the name of Puntila to help us measure the Prospector.

Q. What did you do then?

A. We measured it and found it too wide, and made a discovery on the 22d—I believe it was the 22d—and on the 23d—(interrupted).

The COURT.—22d of what?

A. —of May, 1911. On the 23d of May we staked it—staked the Anaconda, 120 feet wide by 2,640 feet long.

Q. Did you say you staked the claim 2,120 feet wide?

A. 120 feet wide from the initial stake.

Q. I understood you to say 2,120.

A. And 2,640 feet long along the side joining the Mohawk line.

(Testimony of S. C. Adams.)

Mr. HILL.—Q. Where did you say you made the discovery that you say you made on the 22d?

A. In Flat Creek. Right in the creek.

Q. Where was that place in the creek with relation to the boundaries of this fraction?

A. That was within the 120 feet, and below—north of the boundary of the Mohawk. [33]

Q. When you staked that fraction, what stakes, if any, did you see?

A. I found the northeast corner stake of the Prospector, which I took for the initial stake, and I found the southeast—or the southwest—or the northwest corner stake, and then the southwest corner stake and the southeast corner stake adjoining the Mohawk. The four stakes were all I could find on the claim.

Q. Where was the initial stake of the fraction? (Interrupted.)

A. The initial stake—(interrupted.)

Q. Wait a minute until I finish—with relation to what you took to be the initial stake of the Prospector?

A. From the initial stake of the Prospector I measured over to the initial stake of the Mohawk, which was 1,445 feet. That would be the southeast corner stake of the Prospector also. Then I placed my initial stake there and measured 120 feet in a northerly direction—(interrupted).

Q. Just a minute. You say, “In a northerly direction.” Was that back towards this initial stake?

A. Back towards the initial stake.



(Testimony of S. C. Adams.)

Q. Why did you only measure 120 feet?

A. Well, I thought by taking just a strip along there, what pay was on Flat there, I could cover it in 120 feet. And I had been told by Chitic and Muckler that I could stake at either side or end that I wished and leave them their ground intact of 160 acres, or 1,320 feet by 5,280 feet. I thought that was about all I could take.

Q. What ground was directly south of your fraction that you staked?

A. The Mohawk is directly south. [34]

Q. When you say "the Mohawk," what do you mean?

A. I mean the Mohawk Association.

Q. Is that a placer mining claim?

A. A placer mining claim.

Q. And what did you do after you set this second stake in the way you have indicated?

A. After setting the second stake 120 feet in a northerly direction, I blazed a line and measured down 2,640 feet and placed my stake number 3, and measured back to the Mohawk line 120 feet and placed my stake number 4 and blazed the line.

Q. What did you do after that?

A. Then I came back to the initial stake. There was a line blazed through there of the Mohawk.

Q. When you say you made a discovery on this ground, what do you mean by "discovery"?

A. A discovery of gold in paying quantities, which would pay. I had been panning on Flat Creek before, on the Mohawk, as early as between Christmas

(Testimony of S. C. Adams.)

and New Years of 1910. And that Spring at different times I had panned in the Mohawk in the creek and had found gold that would pay to work.

Q. Did you do any work on that claim in 1912?

A. Yes, sir.

Q. I mean on your claim.

A. On the Anaconda; yes, sir.

Q. What did you do in 1912?

A. William Lang and I in 1912 sunk a *hold* and put some drifts in in 1912.

Q. What was the value of that work in 1912?

A. It was over \$100.00 worth of work. [35]

Q. Did you do any work there in 1913?

A. Yes, sir. In 1913 I gave a lay on the ground and sunk a hole 27 feet deep to bedrock.

Q. Did you sink that hole yourself?

A. I helped sink the hole. Yes, sir.

Q. Did you do any work in 1914?

A. In 1914 I did.

Q. What did you do in 1914.

A. In 1914 I sunk, I believe it was, five holes and cleared timber on the upper end. And also in 1913 I rocked all the gravel out of that hole that we sunk in January.

Q. What was the result of your rocking?

A. I found some gold.

Q. Did you ever talk with any of the other owners besides Cash Chitic and Jim Muckler?

A. At one time along about August, 1912, I spoke to Mr. Marston, and I understood he had acquired an interest in the Prospector. Some question came

(Testimony of S. C. Adams.)

up in the Grand Hotel, and he said that he didn't know there was a fraction there as the ground had never been surveyed. And along in August, 1912, I had a conversation with Mr. Austin in his office on Flat Creek opposite the Conlin Saloon in reference to the different interests I had on Flat Creek.

Q. Who is Mr. Austin?

A. Mr. Austin is manager of the Yukon Gold Company.

Q. Did you ever talk with any of the other owners?

A. I talked with Mr. Riley at one time. I was going to give Mr. Riley an option on what property I had there. I talked with him.

Q. Was Mr. Riley an owner?

A. I believe he is an owner by buying. Yes, sir.  
[36]

Thereupon plaintiff offered in evidence, placer location notice of the Anaconda Fraction, which was admitted without objection, marked Exhibit 1, and is as follows:

**Plaintiff's Exhibit 1—Placer Location Notice.**

We, the undersigned, citizens of the United States, have discovered placer gold in the ground herein-after described, and hereby claim for placer mining purposes 15 more or less acres, situated on Flat Creek, a tributary of Otter Creek, in the Otter Recording Mining District, District of Alaska, to be known as Anaconda Fraction and described as follows:

Commencing at the Initial Stake, which is Stake No. 1, on the Southeasterly corner of said claim, and

is situated, tied and joining the southeasterly corner stake No. 2—Prospector Assn. and N. E. corner and Initial Stake No. 1 of Mohawk Assn.

Thence 120 feet in a northerly direction to Stake No. 2, N. E. corner;

Thence 2640 feet in a westerly direction to Stake No. 3, N. W. corner;

Thence 120 feet in a southerly direction to Stake No. 4, S. W. corner;

Thence 2640 feet in a easterly direction to the place of beginning, the Initial Stake, upon which is posted a copy of this notice.

This location is made this 23d day of May, 1911.

Witness:

S. C. ADAMS, Locator.

WAINO PUNTILA.

WM. LANG.

Endorsed: Filed for record at request of S. C. Adams on the 25th day of May, 1911, at 9 A. M. and Recorded in Vol. One of Locations, page 555, Otter Recording District.

ALFRED E. MALTBY,

Recorder.

By C. J. MALTBY.

Thereupon plaintiff offered in evidence deed from William Lang to S. C. Adams, which was admitted without objection, marked Exhibit 2, and is as follows:



**Plaintiff's Exhibit 2—Deed, William Lang to S. C. Adams.**

THIS DEED made this 14th day of September, 1912, at Iditarod, Alaska, between Wm. Lang, grantor, and S. C. Adams, grantee, WITNESSETH:

In consideration of the sum of fifteen hundred dollars (\$1500.00) lawful money of the United States to grantor in hand paid by grantee, the receipt whereof is hereby acknowledged, grantor does hereby grant, bargain and sell to grantee, his heirs and assigns forever, all of the right, title and interest of the grantor in and to the following described placer mining claims situated in the District of Alaska, Otter Recording District, to wit:

That placer mining claim known as the "Anaconda Fraction" containing fifteen (15) acres more or less, location notice of which is of record in Vol. 1 of locations, page 555, records of Otter Recording District; and also,

That placer mining claim known as "North Butte Association" containing one hundred and sixty (160) acres more or less, location notice of which is of record in Vol. 1 of locations, page 556, records of Otter Recording District.

Grantor claims to have a quarter in the Anaconda claim and an eighth in the North Butte, and this deed is intended to convey said quarter and eighth and in addition any other interest grantor may have therein.

To HAVE and to HOLD unto the said grantee his heirs and assigns forever, together with all and singular the tenements, hereditaments and appur-

tenances thereunto belonging or in anywise appertaining.

WITNESS the signature of the grantor this 14th day of September, 1912, at Iditarod, Alaska.

WM. LANGE.

In the presence of

E. COKE HILL,

ALFRED E. MALTBY. [37]

United States of America,

District of Alaska,—ss.

This certifies that on this 14th day of September, 1912, at Iditarod, Alaska, Wm. Lang, to me known to be the individual who executed the above deed, personally appeared before me and in person acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

WITNESS my official seal and signature the day and year in this certificate first above written.

[Seal]

ALFRED E. MALTBY.

Endorsed: Filed for record at the request of S. C. Adams on the 16th day of September, 1912, at 50 min. past 12, and recorded in Vol. 3 of Deeds, page 158, Otter Recording District.

GEORGE W. ALBRECHT,

Recorder.

Thereupon the plaintiff offered in evidence a notice purported to be signed by the Yukon Gold Company which was admitted without objection, marked Exhibit 3, and is as follows:

**Plaintiff's Exhibit 3—Letter, Dated January 13, 1913, The Yukon Gold Company to S. C. Adams.**

Flat Creek, Alaska, January 13, 1913.

Mr. S. C. Adams,

Flat City.

Dear Sir:

You are hereby notified that notices, of which the enclosed are copies, have been posted on the Mohawk and Prospector Association claims, and unless you immediately desist from trespassing thereon, and depart and remain away therefrom you will be prosecuted for trespass in the manner provided by law.

Very respectfully,

THE YUKON GOLD COMPANY.

By J. RIVERS. [38]

Q. I will show you Plaintiff's Exhibit 3 and ask you if you ever saw that before.

A. Yes, I did.

Q. Where and when?

A. I believe it was January 13th or 14th. I believe it was Mr. Rivers or Kettlewell handed it to me. I would not say which one did. It was when I had a boiler and windlass and was working on the Anaconda Fraction.

Q. Were you on any other part of the Prospector at that time? A. No, sir. [39]

Thereupon the plaintiff offered in evidence, placer location notice of the Prospector Association, which was admitted without objection, marked Exhibit 4, and is as follows:

**Plaintiff's Exhibit 4—Placer Location Notice.**

KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, having discovered gold in the ground hereinafter described claim 160 acres for placer mining purposes to be known as the "Prospector Association," situated on Otter Creek, a tributary of the Iditarod in the Innoko Mining District, District of Alaska, and described as follows, to wit:

Commencing at the initial post and running 5,280 feet downstream to lower center post and 1,320 feet on each side of center posts to corner posts.

Located this 10th day of April, 1909.

Locators—C. C. CHITIC,  
TOM DAVIS,  
JIM MUCKLE,  
WM. PILLERS,  
J. MORROWS,  
IRA VAN ORSDOL,  
W. STANLEY,  
L. BLACKBURN,

By JOHN BEATON,

Agt.

Witness:

W. A. DIKEMAN.

2138.

Endorsed: 2138. Recorded at the request of W. A. Dikeman, Jun. 8, 1909, at 2:30 P. M., at page 68, Vol. 1, Records of Innoko Rec. Precinct. W. A. Vinal, Recorder. By H. J. Vinal, Deputy.



(Testimony of S. C. Adams.)

#152-1. S. C. Adams vs. Yukon Gold Co.  
Pltffs. Ex. "4." July 28, 1914. Angus McBride,  
Clerk.

*In the District Court for the District of Alaska,  
Division No. 4, at Iditarod.*

United States of America,  
District of Alaska,  
Division No. 4,—ss.

### CERTIFICATE.

I, Angus McBride, Clerk of the District Court for the District of Alaska, Division No. 4, hereby certify that the foregoing and hereto attached *one pages* of typewritten matter, numbered from — to —, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the original Location Notice of the "Prospector Association" mining claim, as used in evidence in Cause No. 152-1 entitled, S. C. Adams, Plaintiff, vs. Yukon Gold Co. et al., Defendants, and marked Pltffs. Ex. "4," as the same appears on file in my office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this thirty-first day of July, 1914.

[Seal]

ANGUS McBRIDE,  
Clerk. [40]

Q. Now, referring to a later time and the staking of the Anaconda Number 2, when did you stake that?

A. I believe it was July 19th, 1913.

Q. And where did you stake it?

A. It covered—I began at the southeast corner.

(Testimony of S. C. Adams.)

Q. Of what?

A. Of the Prospector, or the southeast corner of the Anaconda Fraction, and staked 125 feet north; then 5,280 feet west; then 125 feet south, and then 5,280 feet back to the place of beginning.

Q. When you measured the west line of the Prospector in the first place from what you took to be the initial post to the Mohawk, what distance did you make it?

A. From the initial post to the Mohawk I measured 1,445 feet.

Q. Did you also measure the east line from the— (interrupted).

A. You have got that mixed. That should be the east line. That is 1,445 feet. The east line is upstream.

Q. The line upon which you placed your initial stake of your Anaconda Fraction you made 1,445 feet? A. 1,445 feet. Yes, sir.

Q. Now, the opposite line to that, what did you make it? Did you measure it?

A. That was some place between 1,475 and 1,500 feet. Yes, sir.

Q. Did you measure the length of the claim?

A. Yes, sir. I found the length of the claim, as near as I can remember now—I haven't the notes from last year. But it was something like 5,700 or 5,750 feet. One line was a little longer than the other.

Q. In staking the Anaconda Number 2, you staked clear across, did you, or aimed to?

(Testimony of S. C. Adams.)

A. I aimed to stake clear down to 5,280 feet. I didn't stake down to the lower line, to the lower post. [41]

Q. When did you say you staked that?

A. July 19th, 1913.

(Plaintiff offers in evidence the Notice of Location of the Anaconda Number 2, and there being no objection by defendant, it is admitted in evidence and marked Plaintiff's Exhibit Number 5. Plaintiff also offers in evidence what purports to be a writing casting off a certain part of the Prospector, and there being no objection by the defendant, it is admitted and marked Plaintiff's Exhibit Number 6.)

Q. I show you Plaintiff's Exhibit 6. (Hands same to the witness.) Did you ever see that before?

A. I seen this in the mail sometime after I arrived in June. I don't know just what date. It must have been about the 20th of June.

Q. What year? A. Of 1914.

Q. You say, after you had arrived. Where had you been? A. I had been outside.

Q. Now, referring back to the conversation that you say you had with Mr. Austin, who was manager of the Yukon Gold Company, in August I believe you said of 1912, was there an Anaconda Fraction mentioned at that time? A. Yes, sir.

Q. Just state that conversation as you remember it.

A. I had met Mr. Austin. I had an appointment with him. I went into the office. I was informed by William Lang that he had a chance to sell his

(Testimony of S. C. Adams.)

quarter interest in the Anaconda, and I had an option and an agreement with him and he couldn't sell it until I sold. And I went in and interviewed Mr. Austin. He showed me a blue-print of the Anaconda Fraction, or he claimed there was a fraction between the Prospector and the Mohawk, and I also claimed a fraction off the Mohawk, but he claimed that I had no fraction existing there. He wanted to know what I wanted for the ground [42] and I gave him my prices, and he said they were too high. But I told him that was my lowest price and I would have to wait.

Q. The prices you speak of include other ground?

A. Yes, sir.

Q. Mr. Adams, was this Anaconda Number 1 the first placer claim you ever staked?

A. It was the first claim I ever staked. Yes, sir.

Mr. HILL.—I suppose it is conceded that Mr. Austin was the agent of the Yukon Gold Company?

Mr. RODEN.—Yes.

Mr. HILL.—Q. You testified as to the conversation between you and some other gentlemen—Mr. Cash Chittie, Mr. Jim Muckler, William Lang and Star Ballard,—who else was present?

A. Charles Krutzinger.

Q. In which you asked Cash Chittie and Jim Muckler for permission to stake off the Prospector. Where is Star Ballard that you referred to?

A. He is in Seattle at present.

Q. Where is Jim Muckler?

A. Jim Muckler I understand is dead.



(Testimony of S. C. Adams.)

Q. Do you know where Jim Muckler died?

A. I found out last summer that he died in Ruby.

Q. Where is Cash Chitic?

A. Cash Chitic is dead. He was lost on the Seward Trail.

Q. When did he die?

A. I believe it was the winter of 1913, or spring of 1914. 1913 I guess. Winter of 1913. [43]

Q. Do you know when Jim Muckler died?

A. I do not. No, sir.

Mr. HILL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. And William Lang. Where is he?

A. William Lang. He is dead. He died at Cripple Creek.

Q. When did you for the first time go upon this Prospector claim?

A. The first time? The town of Flat is upon the Prospector.

Q. I mean, with a view to measure the claim to see if there was an excess.

A. Well, we measured it on the 22d of May.

Q. The 22d of May, 1911? A. Yes, sir.

Q. Before the 22d of May, 1911, or before you measured this claim, did you go to the recording office to look at the notice there?

A. No, sir. I did not.

Q. When you went on there for the purpose of measuring, who went with you?

A. We hired a man by the name of Warren Pun-

(Testimony of S. C. Adams.)

tila. I have an affidavit from him.

Q. You and William Lang took him with you.

A. Took Puntila with us.

Q. Which stake of the Prospector did you find first? A. We found the north—(interrupted).

Mr. RODEN.—It may be easier and probably more intelligible to take the map, one of the old exhibits. (Hands a map to the witness.)

Q. Which stake did you first find of that Prospector?

A. It would be the northeast corner. [44]

Q. What did you find there?

A. I found a bunch of stakes there. I believe there was a—(interrupted).

The COURT.—Do you propose to introduce this in evidence?

Mr. RODEN.—I was going to do it with the testimony of the other witnesses.

Q. You found the northeast corner stake of the claim. How did you know it was the northeast corner stake of the Prospector?

A. Well, at that time I could make out some writing on it I believe.

Q. Then what did you do?

A. I measured from here (indicating) over to the southeast corner.

Q. Of the Prospector? A. Of the Prospector.

Q. You found the southeast corner of the Prospector, did you?

A. Adjoining the initial stake of the Mohawk; yes, sir.

(Testimony of S. C. Adams.)

Q. In measuring that line down there, did you see any other stakes?    A. No, sir. I did not.

Q. Was that line blazed?    A. Yes, sir.

Q. How was it blazed?

A. Well, it was blazed through there.

Q. Was it blazed so you could follow it?

A. Yes, sir.

Q. And you saw no other stakes between the north-east and southeast corner stakes?

A. No, sir. [45]

Q. What was the next thing that you did?

A. After that I measured this line down to the other line—the side line.

Q. You measured along the northerly boundary line of the Prospector?

A. The northerly line. Yes, sir.

Q. How did you establish that line?

A. On that line I found that stake away down at the lower end, across the river.

Q. You found a stake?    A. Yes.

Q. Could you follow the line there?

A. Follow the line pretty near all the way. There were places where you couldn't follow the blazes?

Q. Why couldn't you follow it?

A. Because the brush had grown up.

Q. But you found the northwest corner of the Prospector?    A. Yes.

Q. Was there any writing on that stake?

A. I am not sure whether there was any writing on that stake or not.

Q. Can you remember how you established it as

(Testimony of S. C. Adams.)

being the northwest corner of the Prospector?

A. Yes, sir. There was a cabin down there, and it was the only stake I could find over there that came anywhere near where the Prospector stake should be.

Q. Then what did you do?

A. Then I measured across to the southwest corner.

Q. Of what claim?

A. Of the Prospector. That would be—the Mohawk stake was there. [46]

Q. That would be the upper stake—(interrupted).

A. The northwest corner stake of the Mohawk, and I believe the Black Fox. There was a bunch of stakes standing there.

Q. When you measured the line from the northwest corner post of the Prospector to the southwest corner post of the Prospector, did you come across any other stakes? A. No, sir, I did not.

Q. Did you follow the line between those two stakes? A. As near as I could. Yes, sir.

Q. The line was blazed, wasn't it?

A. I am not positive. There was some blazing through there. I followed the line as near as I could, but I couldn't say—(interrupted).

Q. You didn't see any stake marking the original lower center stake of that line? A. I did not.

Q. I didn't mean to say marked "original" on the stake, but simply "lower center stake."

A. No, sir. I have never.

Q. And at the other end line you say you saw no



(Testimony of S. C. Adams.)

stake between the northeast and southeast corner stakes?

A. No, sir. I never did see a stake—(interrupted).

Q. You didn't see a stake on that line there marked "Initial stake"? A. No, sir. I didn't.

Q. Did you look for any stakes along there?

A. I have.

Q. And you never found them? A. No, sir.

Q. This was in May, 1911?

A. In May, 1911. Yes. [47]

Q. On the 22d of May?

A. 23d of May I located.

Q. I mean when you went over the claim was on the 22d? A. On the 22d, yes.

Q. And the following day you located? A. Yes.

Q. When you measured the easterly end line of that claim, how long did you find it?

A. 1,445 feet.

Q. And how long did you find the westerly end line?

A. It was, as near as I remember now, between 1,475 and 1,500 feet.

Q. And how long did you find the northerly boundary line?

A. As near as I can remember, it was something like 5,700 or 5,750 feet. There was a little difference between the two lines, the northerly and the southerly.

Q. How much did you find? How long was the southerly boundary line?

(Testimony of S. C. Adams.)

A. There was some difference,—fifty feet or more—between them.

Q. Were you careful in measuring those distances?

A. Yes, sir. As near as I could.

Q. How did you measure them?

A. We had a little tape line and the three of us would go along and put pegs in.

Q. When was it that you say you talked to Cash Chitic and Jim Muckler?

A. It was some time the latter part of March or the first of April, 1911.

Q. And what did they tell you?

A. They told me that I could stake a fraction at either side or end that I wished, if the Prospector was in excess of 1,320 feet by 5,280 feet, as all they claimed was 160 acres. [48]

Q. How did that conversation happen to come up at that time? Did you then know or have an idea that the Prospector was excessive?

A. I did. Yes, sir.

Q. When had you found that out?

A. There were different men I talked to that year and different interests being bought—some interests being bought in the Mohawk at that time. And I was figuring on getting hold of some ground if there was any ground to be had, and I had been over the Prospector and Mohawk many times.

Q. You had been over the Prospector before the 22d of May with a view of ascertaining if there was any excess?

A. If it was large. And I always thought it was

(Testimony of S. C. Adams.)

large every time I had been over it.

Q. Did you tell Cash Chitic and Muckler that it was excessive?

A. I told them I thought it was large.

Q. What did you tell them, as near as you can recollect now?

A. I told them I thought it was in excess of 160 acres.

Q. But you never told them at any one time, as a matter of fact, that it was excessive?

A. Not to my knowledge.

Q. What reply did they give to you?

A. They told me at that time that if it was in excess of 1,320 feet by 5,280 feet that I could stake at either side or end that I wished.

Q. This was in March?

A. Latter part of March or first of April.

Q. And after you measured it on the 22d of May, 1911, and before you staked it, you didn't tell them that the claim was excessive, as a matter of fact, did you?

A. I don't remember as I saw them. I measured it for the purpose of staking it, and as soon as I got it measured staked it. [49]

Q. You didn't tell them that it was excessive, did you?

A. A very short time after that I was doing work on it, and they knew I had done the work on it, and they never—(interrupted).

Q. Answer the question.

(Testimony of S. C. Adams.)

A. I didn't go to them and tell them that it was excessive.

Q. You never did tell them? (No answer.) Now, did you ever figure out from the figures that you obtained as the result of your measurements, what the excess in area really was?

A. No; not exactly. In the first fraction is probably about six or seven acres, and—(interrupted).

Q. Let's not get the matter mixed up. Did you ever figure out how many acres that would make?

A. In the whole Prospector?

Q. Yes. According to your figures.

A. No. I never figured it out exactly. But I knew that 160 acres was 1,320 feet by 5,280 feet.

Q. Did you ever figure out how much it would make? A. No, I never did.

Q. Anywhere near?

A. Why, it was a few acres over.

Q. Do you know as a matter of fact that according to your figures it would make 192 acres in the Prospector?

A. I do not. I have never figured it out.

Q. How did you determine upon how much ground you should stake?

A. I figured the east line was 1,445 feet, and that it should be 1,320 feet; and the west line was between 1,475 and 1,450 feet, and should be only 1,320 feet; and the north line and south line should be only 5,280 feet, and they were about 5,700 feet. [50]

Q. Then you could figure exactly. You are a pretty good man at figures. You were manager for



(Testimony of S. C. Adams.)

a big mercantile company.

A. At that time I didn't take the chances, as I remember, of figuring out how many acres it was. I probably could do it if I had thought of it at the time.

Q. We will go back to your conversation with Cash Crittic. At the time you talked to Cash Chittie before the time you staked—you staked it May 23d, 1911—you knew who the owners of the Prospector Association were, didn't you? A. I did not.

Q. Did you ever make any effort to find out who they were?

A. I did. The only one I ever did find out was a man by the name of Davis, and I heard he was on Happy Creek at one time.

Q. You learned that Tom Davis was a locator?

A. Yes.

Q. Did you ever tell him that the claim was excessive and that you wanted to stake a fraction off of it?

A. I could never find the man.

Q. You knew he was on Happy Creek?

A. I heard he was on Happy Creek and I went over there one time to find him.

Q. Happy Creek is how far from the Prospector claim? A. About six or seven miles.

Q. Did you know about that time that William Dikeman was an owner in the Prospector claim?

A. I found out he was an owner, but I could never find him. Dikeman wasn't in the country that spring.

Q. Did you ever make any effort to find Dikeman?

(Testimony of S. C. Adams.)

A. I did. But I found out he was not in the country. [51]

Q. When did you make an effort to find him?

A. I inquired at different times.

Q. When, for example?

A. I don't remember just at what time I inquired. It must have been along that spring sometime that I inquired for Dikeman.

Q. You inquired before the 23d of May as to the whereabouts of Dikeman?

A. I don't remember that I did.

Q. Did you know that John Beaton had an interest in that claim? A. No, sir.

Q. You know it now?

A. I know it now. Yes, sir.

Q. When did you find out for the first time that John Beaton had an interest in the claim?

A. After I looked the records up.

Q. When was that?

A. I looked the records up in this trial last year.

Q. That was the first time you found out who the owners of the Prospector claim were?

A. It was before that that I had been talking to Riley and Beaton in reference—(interrupted).

Q. Why did you talk to Beaton if you didn't know he had an interest there before the time of the trial last year?

A. I was trying to sell the interest to Beaton and Riley before that.

Q. Then you knew that Beaton had an interest in the claim?

(Testimony of S. C. Adams.)

A. Beaton, Riley & Marston. Yes.

Q. How do you know that Riley had an interest in there?

A. From some records I found out that Riley and Marston had bought some interest from Beaton.  
[52]

Q. Did you find out from those records?

A. I believe I did. I am not sure.

Q. What you found is this: You found an option on record, made by William Dikeman to Riley & Marston, didn't you?

A. That might probably have been it. I don't recollect it just now.

Q. And the Beaton interest had nothing to do with that at all? A. Now, I wouldn't say.

Q. Why didn't you make Riley and Marston parties to your suit and leave Beaton and Dikeman out?

A. I can't answer that right now.

Q. So there may be no misunderstanding. You know now and you have known for some time that William Dikeman did give an option to Riley and Marston on his interest in the Prospector Claim?

A. I guess he gave an interest, or an option, or bought it, or a lay. In some way they got an interest in the Prospector.

Q. Going back to Beaton. Before the 23d day of May, 1913, when you located the Anaconda Fraction, you never notified John Beaton that there was an excess on the claim, did you?

A. The 23d day of May of what year?

Q. 1911.

(Testimony of S. C. Adams.)

A. No. Johnny Beaton—I didn't know who he was, or if he was in the camp.

Q. You didn't know he had an interest in the claim at that time? A. Not at that time.

Q. You never made any effort to find out who had an interest until last year? A. Yes, I had.

Q. You found out in the recorder's office last summer? A. Yes. [53]

Q. Prior to this trial?

A. Yes. And I knew—heard it before then.

Q. Did you ever tell Ira Van Orsdol that there was an excess in the Prospector, prior to May 23d, 1911?

A. I never knew Van Orsdol until last summer.

Q. Did you ever tell Stemley?

A. I never have seen the man Stemley.

Q. Did you ever tell Piller?

A. I do not know Mr. Piller.

Q. Did you ever tell Blackburn?

A. I don't know Blackburn. I don't believe those men have ever been in the camp.

Q. You know Van Orsdol has been in the camp?

A. I never knew it until last summer.

Q. You never knew he had an interest in the claim until last summer? A. Last summer, some time.

Q. When you went to the recorder's office?

A. Yes.

Q. You never thought it worth your while to go to the recorder's office and find out who the locators of the Prospector were, before you staked your fraction on the 23d day of May, 1911.

(Plaintiff objects as irrelevant, incompetent and



(Testimony of S. C. Adams.)

immaterial. Objection sustained.)

Q. Leave out the words, "Never thought it worth your while." You never did go? A. No, sir.

Q. Since you came to this portion of the Territory, you have always known where the recorder's office of this precinct was to be found?

A. It was in Iditarod, six or seven miles away.  
[54]

Q. It has been there all the time that you have been there? A. Yes.

Q. The recorder's office was in Iditarod at the time you located the Anaconda Fraction in May, 1911, and the recorder's office was at Iditarod when you located the Anaconda Number 2 in 1913, wasn't it? A. Yes, sir.

Q. And you have been at Iditarod frequently during the years 1910, 1911, 1912 and 1913?

A. Yes.

Q. Now, that conversation that you had with Mr. Austin was what time in 1912, you say?

A. I believe it was some time in August, 1912.

Q. That was at Flat City?

A. At Flat City, yes.

Q. Who was present at that conversation?

A. Mr. Austin and myself.

Q. What did you say in the course of this conversation?

A. Well, trying to dispose of what ground I had.

Q. At that time what ground did you have?

A. I had the Anaconda Fraction. I had the North Butte.

(Testimony of S. C. Adams.)

Q. Where is the North Butte location with reference to the Prospector Claim?

A. The North Butte is north, paralleling the Prospector.

Q. Does it adjoin the north boundary of the Prospector?     A. It does.     Yes, sir.

Q. And did you have anything else? Did you have any other property at that time you were talking to him?     A. Yes. [55]

Q. What other property did you have?

A. I had a fraction off of the Mohawk, known as the Great Falls Fraction.

Q. Where was that Great Falls Fraction located with reference to the Anaconda Fraction?

A. This (indicating on map) would be the initial stake of the Mohawk. The Mohawk was too large and there was a fraction, the Myrtle, staked off the Mohawk 350 feet wide, and I staked a fraction in between the Mohawk and the Myrtle. There had been a fraction staked there in the early days.

Q. Here is another map. (Hands same to witness.) Now, this map shows both the claims, the Prospector claim and the Anaconda Fraction.

A. Yes, sir.

Q. As I understand you now, your first location of the Anaconda Fraction was 2,640 feet.

A. Yes, sir.

Q. Along the southerly boundary line of the Prospector?     A. Of the Prospector.

Q. And 120 feet northerly.     A. Yes, sir.

Q. And then back 2,640 feet?     A. Yes, sir.

(Testimony of S. C. Adams.)

Q. And the Anaconda Number 2 was 5,280 feet along the southerly boundary line of the Prospector.

A. Yes, sir.

Q. Then northerly 125 feet; then easterly 5,280 feet; and then southerly 125 feet. A. Yes, sir.

Q. You testified with reference to the North Butte that it was located along the northerly boundary line of the Prospector. A. Yes, sir. [56]

Q. Kindly mark it in on the map here. (Witness marks same on the map, and Mr. Roden numbers the corners 1, 2, 3, and 4.) Now, the Great Falls Fraction. Where was that located?

A. The Great Falls Fraction—here (indicating on map) is the initial stake of the Mohawk. Here is stake No. 2 and the southeast corner. Then the Myrtle is staked off 350 and some odd feet, and I staked 25 feet in between the Myrtle and the Mohawk.

Q. You staked 25 feet along the easterly—(interrupted).

A. The southerly line, or the easterly line of the Mohawk.

Q. And 5,280 feet long. Is that what it was?

A. That was what it was.

Q. In a—(interrupted).

A. Westerly direction.

Q. Then 25 feet northerly; then 5,280 feet easterly again. A. Yes, sir.

Q. So, when you had the conversation with Mr. Austin you offered to sell him your Great Falls Fraction. A. Yes, sir.

(Testimony of S. C. Adams.)

Q. Between the Myrtle and the Mohawk.

A. Yes, sir.

Q. Your Anaconda Fraction between the Mohawk and the Prospector,      A. Yes.

Q. And your Great Falls Fraction lying along the northerly boundary—(interrupted).

The COURT.—You mean the North Butte.

Mr. RODEN.—Yes.

A. The North Butte.    Yes.

Q. What was said at that time with reference to this Anaconda Fraction?    [57]

A. The blue-print that he had showed the Anaconda Fraction. But he claimed there was no Great Falls Fraction existing.

Q. The blue-print which Mr. Austin had showed the Anaconda Fraction?      A. Yes.

Q. You are sure of that?

A. Yes. I am sure of that.

Q. Did he say anything about the name?

A. No. He said there was a fraction there, and there was a line there, a white line. It was on a little blue-print that he showed me that day. And he said there was a fraction there and wanted to know what I wanted for it, and I told him what I wanted for all the interests, and he said it was too much.

Q. You maintain that the Anaconda Fraction was marked on that blue-print.

A. I wouldn't say it was marked "Anaconda Fraction." I say there was a fraction there, and Mr. Austin said there was a fraction there.



(Testimony of S. C. Adams.)

Q. He said there was a fraction between the claims.     A. Between the Prospector and Mohawk.

Q. Did he say at that time that there was a fraction between the Prospector and the Mohawk, or a fraction off the Prospector?

A. He said there was a fraction there, and in his blue-print was shown a fraction drawn in between the Prospector and the Mohawk.

Q. So, if I understand you correctly, the blue-print showed the fraction between the southerly boundary line of the Prospector and the northerly boundary line of the Mohawk.

A. It would be between them or taken off the Prospector. [58] It showed the same. Mr. Austin, as I took it, knew my fraction was there and put it on his map, and it showed the fraction there.

Q. As you say, it showed or might have showed it as being off the southern end of the Prospector.

A. The southerly side.

Q. That is what I mean; the southerly side. Now, didn't it clearly show you that it was off the northerly side of the Mohawk?

A. There was no fraction off the northerly side of the Mohawk, because, the way they had the map, the initial stake of the Mohawk would show on his map.

Q. It showed all the stakes, did it?

A. Well, I don't know as it showed the stakes. It showed the block of the Mohawk and it showed the block of the Prospector, and it showed the claims above it.

(Testimony of S. C. Adams.)

Q. And this conversation you say took place in August, 1912.

A. Some time in August, as I remember.

Q. And you and Mr. Austin couldn't make a deal.

A. We did not. No, sir.

Q. Then you said, in answer to a question Mr. Hill put to you, that the Anaconda Fraction was the first claim that you ever located.

A. Yes. That is right.

Q. The first claim you ever located in your life.

A. Yes, sir.

Q. That was on the 23d of May.

A. 23d of May, 1911.

Q. When did you locate the North Butte?

A. It was the same day or the day after. [59]

Q. Wasn't it the day before?

A. No. I don't think so.

Q. You recorded the location notice of that, didn't you? A. Yes, sir.

Q. Is the correct date in that location notice?

A. Yes. I believe it is the day after. I believe it is the 24.

Q. Now, did you locate the Butte Fraction, too?

A. Yes.

Q. Where is that located?

A. This Butte Fraction was an old location that I found out didn't exist.

Q. Where was it located with reference to the Anaconda Fraction? A. It covered the Myrtle.

Q. Along which line?

A. It covered the whole Myrtle, 350 feet.

(Testimony of S. C. Adams.)

Q. In width?      A. In width.

Q. You tried to take in by your Butte Fraction all the ground already covered by the Myrtle.

A. Yes, by the Myrtle stakes.

Q. When did you stake that?

A. That was about the same time. It might have been the 22d, 23d or 24th.

Q. So, you wouldn't be positive whether or not the location of the Anaconda Fraction was the first claim you ever staked in your life.

A. The Butte Fraction might have been the first, and it might have been on the 23d or 24th, but just about that time.

Q. You couldn't find the Myrtle stakes when you attempted to locate the Butte Fraction all over the Myrtle? [60]      A. Not at that time.

Q. You found them afterwards.

A. I found them afterwards.

Q. When did you locate the Anaconda Number 2?

A. It was July 19th, 1913.

Q. Before you located the Anaconda Number 2 did you see any of the then owners of the Prospector Association?      A. I did not.

Q. What induced you to locate the Anaconda Number 2?

A. There was extra ground there and they never cast any of it off, and I knew that the ground was wide.

Q. How did you know there was an excess?

A. I measured it before.

Q. You measured it once before?      A. Yes, sir.

(Testimony of S. C. Adams.)

Q. And you figured it out after you made your location of the first fraction.

A. Yes. I figured it out.

Q. How many acres did you make it at that time that the excess amounted to?

A. Why, I figured it was an excess of over 20 acres.

Q. You made an attempt to take that all in?

A. As near as possible. Yes, sir.

Q. Now, at that time why didn't you locate Anaconda Number 2 in some other shape?

A. I couldn't take a piece of ground out of the center of their claim. That wouldn't hardly be right.

Q. You located the Anaconda Fraction and took a piece right out of their claim.

A. From the initial stake 1,320 feet by 5,280 feet. I allowed them all that ground intact. [61]

Q. When you located the Anaconda Fraction you took a piece right out of the very body of the claim and left them a little strip towards the south, and the body of the claim due north.

A. It was too wide all the way down, and too long.

Q. I ask you if you did that?

A. I took a piece 2,640 feet clear across the creek. Yes, sir.

Q. This map is correct, isn't it?

A. As near as I remember.

Q. So, when you staked the Anaconda Fraction here you just cut a piece right square out of the Prospector claim.



(Testimony of S. C. Adams.)

A. I took it off of the south, off to the side, as Mr. Chitic and Mr. Muckler told me I could do. They told me to take it off either side or end as I wished. That is why I took it off the side.

Q. When you located your Anaconda Number 2, why didn't you take more ground in a northerly direction, and not take this long narrow strip along there?

A. I always felt that I should leave them their 1,320 feet wide.

Q. That is how you felt.

A. Yes. I didn't believe it was right if I had gone in and taken 20 acres out of the center here—that wouldn't have been right—and leave them ground on all sides.

Q. You were looking for the pay, were you not?

A. Yes.

Q. You didn't have much compunction in taking away pay from the Yukon Gold Company.

A. The Yukon Gold Company wasn't in the country when I staked that. [62]

Q. When you staked Number 2?

A. When I staked Number 2 they were.

Q. They were the owners of it when you staked Number 2, with the exception of Dikeman and Beaton.

A. I don't know what interest they owned.

Q. Do you know what interest they have now?

A. I couldn't state without looking it up. I don't know what interest they have. I know they have some interest, but I don't know the amount.

(Testimony of S. C. Adams.)

Q. You know they have that ground.

A. I don't know if it is a  $\frac{1}{2}$ ,  $\frac{1}{4}$ ,  $\frac{5}{8}$ , or what.

Q. At the time you staked the Anaconda Fraction Number 2 they had the same interest as to-day, so far as you know?      A. As far as I know.    Yes.

Q. But you didn't want to take the pay away from them. (No answer.) When you located that Anaconda Fraction you were the owner of the North Butte claim which lay alongside of the northerly boundary of the Prospector. Now, why didn't you locate the fraction at the northerly end so as to get your ground all in a body?

The COURT.—Do you mean the end or the side?

Mr. RODEN.—The north side.

A. The North Butte was located by eight of us at the time.

Q. And the Anaconda Fraction?      A. By two.

Q. That is the reason why you separated your locations.      A. Yes.

Q. You didn't want them in a body. (No answer.) Why didn't you locate at either of the end lines?

A. For the simple reason that I had made a discovery in Flat Creek, and I had never made a discovery on either end of the claim, and I figured that I shouldn't locate at either end if I hadn't made a discovery.

Mr. RODEN.—That is all. [63]

Redirect Examination.

(By Mr. HILL.)

Q. In answer to Mr. Roden's questions about the

(Testimony of S. C. Adams.)

ownership, you said you had never looked up the record, as I understood it, before the time you located the Anaconda, that is, May 23d, 1911.

A. May 23d, 1911.

Q. What did you know, if anything, about the ownership of Cash Chitic or Jim Muckler?

A. I had seen Mr. Chitic working there on the Prospector, and I knew that the town of Flat was on the Prospector. I knew where the Mohawk was—(interrupted).

Q. I am not asking you about that. I asked you what you knew about Cash Chitic and Jim Muckler.

A. I know they told me they had an interest in the Prospector Association.

Q. Did you know Ira Van Orsdol at that time?

A. No, sir. I did not.

Q. Do you know whether he was in the camp here at that time?

A. I never knew the man until last summer. I don't believe he was in the camp at that time.

Q. Do you know whether Mr. P. F. Stimley was in the camp at that time?

A. No, sir. Mr. Stimley, to my knowledge, has never been in the camp since I have been here.

Q. William Piller?

A. I don't believe Mr. Piller has ever been here since 1910, since I have been here. I have never met him.

Q. Blackburn. Louis or Sam. I don't know who located this.

Mr. RODEN.—Louis.

(Testimony of S. C. Adams.)

A. No, sir. I have never heard of Mr. Blackburn claiming. [64]

Mr. HILL.—Q. You spoke about seeing Davis, or trying to see Davis. When did you learn about Davis?

A. That was some time in March or April before I had staked this ground. I had heard that Tom Davis owned an interest in the Prospector.

Q. When was it you were trying to see him?

A. It was some time the latter part of March or first of April. I believe it was along about the first of April that I went over to Happy Creek.

Q. When was the first time you ever looked up the records as to the Prospector Association?

A. I couldn't just exactly state the time. I know I looked up the records on it.

Q. Do you know what year it was? Did you look them up in 1913 or 1912.

A. I believe—I wouldn't say it was 1912—in 1913.

Q. You looked them up in 1913?

A. Yes. And I think I looked them up in 1914. I know I looked them up in 1914.

Q. Now, at the time you were with Mr. Austin, you claimed the North Butte claim, and what other claims?

A. The Great Falls Fraction and the Anaconda Fraction.

Q. And what else?

A. And I believe I had the Ben Hur on Chicken.

Q. This Butte Fraction that you told about. You say you staked that over the Myrtle.



(Testimony of S. C. Adams.)

A. That was a fraction that was staked over the Myrtle. I looked up the Myrtle stakes and I could never find the stakes, and I staked a fraction there called the Butte Fraction. Then I found the *Butte* stakes and abandoned the Butte Fraction. [65]

Q. You what?

A. I gave up the Butte Fraction, as I found the Myrtle was an existing claim.

Q. When you staked the Anaconda you aimed to follow the line of the Mohawk.

A. I aimed to join the Mohawk line. Yes.

Q. If this map should be correct—and I do not admit that it is—if this map should be correct, then the southwest corner should be a little off of the dark line. Is that intentional? (Indicating on map.)

A. No, sir. If this is correct and this is the Mohawk line, the stake should be over here, because I aimed to carry this line clear through that Mohawk line.

Q. Now, do you know whether there is any initial stake of the Prospector at that point on the bend of the river now?

A. I believe that Mr. Austin made a survey and that they put that stake there. I was never able to see any stake there before at any time.

Q. The stake that is there now is a new stake, is it?

A. It is a stake. Yes, sir.

Q. At this northeast corner of the Prospector, that stake that you saw there you thought was the initial stake.

(Testimony of S. C. Adams.)

A. I have always taken that for the initial stake of the Prospector—the northeast corner stake.

Q. Do you remember what was on that stake when you first saw it?

A. As near as I remember it was marked “Prospector Association.”

Q. Was there anything else on the stake?

A. I couldn't swear to that.

Q. Any notice? [66]

A. I have seen notices posted on there. As near as I remember, there was a notice posted on there at one time about wood not allowed to be cut on this claim—the Prospector claim, signed by Mr. Chittie. I know in the winter or spring of 1911 Mr. Chittie was having quite a time forbidding people to cut wood on the Prospector. Fellows would go out and cut a little wood for their fires, and he claimed he needed all the wood for mining purposes.

Mr. HILL.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. Cash Chittie and his brother were working on the claim when you staked that fraction?

A. Yes, sir.

Q. Working a lease, as laymen and owners?

A. Yes, sir.

Q. Do you want the Court to understand now that the initial stake at the easterly boundary was put up there at the time the survey was made there,—this

(Testimony of S. C. Adams.)

stake here; that this stake was put up there during the last eighteen months?

A. I claim that I had never seen a stake there until last summer.

Q. How many stakes had you seen there?

A. This last summer?

Q. Yes. At that point.

A. As near as I remember, I only saw one.

Q. That is the first time you saw it.

A. That is the first time I ever saw a stake there.

Q. This Prospector claim is a claim located on Otter Creek. A. Yes, sir. [67]

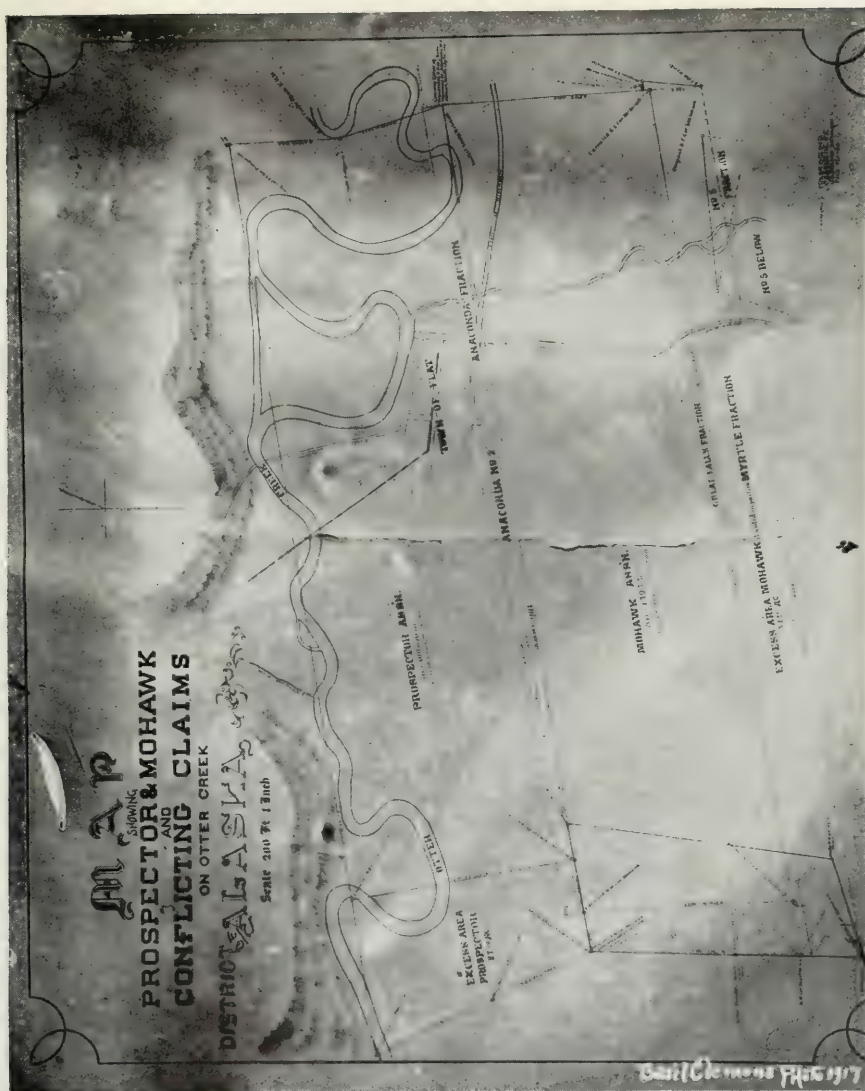
Q. Do you know what the custom was in this country in reference to staking fractions or excessive areas?

(Plaintiff objects as immaterial and irrelevant. Objection sustained. Mr. Roden states that he withdraws the question.)

Mr. RODEN.—That is all.

(The map drawn on paper and heretofore referred to in the testimony of the witness is introduced in evidence and marked as Defendant's Exhibit "A," as giving and showing a general idea of the properties, but the markings on it, such as "Initial stake of the Prospector," are objected to by plaintiff, and not admitted to be correct.)

Defendants' Exhibit "A."





(Testimony of S. C. Adams.)

Mr. HILL.—Is it conceded that there is 27 acres excess?

Mr. RODEN.—Yes.

Mr. HILL.—Just another question. Q. Out here at the northwest corner of the Prospector, along this northwest end of the Prospector, what did you find when you looked it over, relative to other stakes? You mentioned the Black Fox.

A. The Black Fox runs right on down the creek from the Prospector, runs down west.

Q. From the west end of the Prospector the Black Fox claim is the next one.

A. I believe the Black Fox is the next one.

Q. Were there stakes indicating claims adjoining the Prospector at the west end?

A. We found stakes here. (Indicating.) Quite a bunch of stakes. And I believe there were two stakes here. I think there was one stake sitting out quite a little ways from another stake. And there was an old cabin down there.

Q. What is the nature of the ground off here to the westward?

A. It makes a little turn of the river here, and there is bluffs, and then the ground is flat like the rest of the creek. The river turns and there is a bluff in here and it comes into another bluff. It is about the same as up Otter, as near as I remember.

Mr. HILL.—That is all. [68]

**Testimony of E. A. Austin, for Defendants.**

E. A. AUSTIN, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is E. A. Austin.      A. Yes, sir.

Q. What position do you occupy for the defendant the Yukon Gold Company?      A. Resident Manager.

Q. How long have you occupied that position?

A. Since the spring of 1912.

Q. Do you know the plaintiff in this action, Mr. S. C. Adams?      A. Yes, sir.

Q. Did you know him in the fall of 1912?

A. Yes. I met him during the summer of 1912.

Q. Do you remember the interview he had with you to which he testified herein in his examination this morning?      A. Yes, sir. I do.

Q. State to the Court about what time of year that took place.

A. I don't recollect just exactly what time, but I know it was during the summer. It was probably in July or August. I think in August.

Q. What year?      A. 1912.

Q. What took place, or what was said at that conversation?

A. I met Mr. Adams on the street, and he told me that he had various claims and wanted to know if we wished to buy the property which he, Adams, owned. So I asked him to come over to the office, I think that

(Testimony of E. A. Austin.)

afternoon. I know it was some time later—which he did. I asked Mr. [69] Adams to tell me where the claims were. He started in telling me, and I asked him to draw a sketch map showing me the approximate locations and the size of the claims. I produced a piece of paper and he drew a sketch showing the different claims that he owned. As I recollect now, he showed the North Butte, the Anaconda, the Great Falls. All those were the claims at the lower end of the creek that he was particularly interested in.

Q. At that time did he explain to you where the Anaconda Fraction was located?

A. Yes, sir. He did.

Q. Where did he say?

A. He told me that the claim was located between the Prospector and Mohawk associations.

Q. Did he say anything about the Anaconda Fraction being a portion of the original Prospector location? A. No, sir. He did not.

Q. At that time, did you show him a map of the Prospector claim and adjoining claims?

A. Yes, sir.

Q. Have you got that map now?

A. I have not the map which I showed him, but this (producing) is a print taken from the tracing from which the other blue-print to which Adams referred was made.

Q. Do you know where the map which you showed at that time is? A. No, sir. I do not.

Q. Who made this tracing here; or, who made your

(Testimony of E. A. Austin.)  
original map, if you remember?

A. The original map was made by a man named Williams, I think in 1911. [70]

Q. And that is the one you showed to Mr. Adams when he interviewed you on that occasion.

A. A print similar to this, made from the same tracing.

Q. Are you positive now that that is an exact copy of the map that you used at that time in your conversation with Mr. Adams? A. Yes, I am.

Q. In that map, does it show the location of the Anaconda Fraction as claimed by Mr. Adams?

A. No, sir. It does not.

Q. Does it show anything about a fraction at all?

(Plaintiff moves to strike the answer until he can object, and objects to testimony as to what the map shows as not the best evidence; that he cannot testify orally to what the map shows without producing his map; that defendant is not offering the map, but asking questions as to what it shows. Objections sustained.)

Q. You remember that map that you had at that time? A. Yes, sir. I do.

Q. I wish you would describe that map with reference to the Mohawk and the Prospector Association claims.

(Plaintiff objects as not calling for the best evidence.)

Q. Do you know where the original map is?

A. The original from which this was taken?

Q. No. The map that you used at the time you had



(Testimony of E. A. Austin.)

the conversation with Mr. Adams.

A. No, sir. I do not. At that time I had quite a few prints similar to this. I think some were blue-prints and some were white-prints. These maps were made up from an original map which was—well, the data was secured during 1911 when Flat Creek was examined for the company by Mr. W. F. Copeland. The tracing was made partly here on Flat Creek, and partly made from notes and made while enroute between here and Tanana. This print was [71] made in New York City during the winter—I think this was made early in the spring of 1912.

Mr. HILL.—I don't like to interrupt, but I move to strike all this answer out as not responsive.

Mr. RODEN.—He is showing what became of the original.

Mr. HILL.—I would like to examine him a little.

The COURT.—As to whether or not it is a correct print? That is another matter.

Mr. HILL.—I don't understand that this is offered as secondary evidence, but I would like to have the privilege of examining him before it is offered as secondary evidence.

The COURT.—(To Mr. Roden.) Do you propose to *differ* this as secondary evidence?

Mr. RODEN.—In due course of the trial, the same as it was in the former case, the former trial.

The COURT.—(To Mr. Hill.) You will have an opportunity to examine him.

Mr. RODEN.—Q. You say this is a true copy of the plat that was used in your conversation with Mr.

(Testimony of E. A. Austin.)

Adams?      A. Yes, sir. It is.

Q. Does that plat show anything with reference to the location of the Anaconda Fraction?

(Plaintiff objects as not the best evidence; that defendant should introduce the plat, and not ask orally what it shows. Objection sustained. Whereupon defendant offers said plat in evidence, and Mr. Hill, on behalf of plaintiff asks, and is given leave to examine the witness with regard to same.)

(By Mr. HILL.)

Q. You say you don't know where the original that you showed Mr. Adams is?      A. No, sir.

Q. And you don't know but what it is in your possession, do you?      A. It may be. [72]

Q. It might be right out at Flat Creek now.

A. Yes, sir. It might be. I have no way of telling one print from another. They are all similar. But I think that the print that I showed Adams at that time was a blue-print. Adams stated it was a blue-print and it probably was. I have blue-prints and white-prints out there.

Q. There were pencilings on it that you and Adams made at that time.

A. I think we did make pencil marks on it at that time. Mr. Adams drew a sketch of his property and I think I sketched it in on this map.

Q. Then, if you had it out there you could find it? You would know it from other maps?

A. I have looked for it, and I couldn't find it.

Q. You didn't destroy it purposely?

A. No, sir. I may have destroyed it. But I

(Testimony of E. A. Austin.)

thought I had it in my possession last year. I had never paid any particular attention to it until I was served with a notice last summer.

Q. Then, this copy which you are offering does not show the pencil marks that you and Adams made there, does it?     A. No, sir.

Q. Then it is not a true copy of the map as Adams saw it and as it was after you and Adams got through with it.

A. Not afterwards. I didn't state it was afterwards.

Q. You couldn't say positively that it wouldn't be in your power and that it is not in your power to produce that map. It might be out there at Flat.

A. It might be, but I don't think it is, because I have looked through our files. [73]

(Plaintiff objects to the map as not a true copy, and shown not to be a true copy of the map as they looked it over; and it is not shown that it is not within the power of the witness to have the true map here; but asks leave to ask another question, which leave is granted.)

Q. This map is not a copy of that map?

A. It is a duplicate.

Q. Taken from the same tracing?     A. Yes, sir.

Q. You had other tracings of that at other times?

A. Not up to the time that was made.

Q. It wouldn't be possible for you to be mistaken—that it could be some other tracing?

A. No, sir. That is the only map of that scale

(Testimony of E. A. Austin.)

which we have of Flat Creek or which we had at that time.

(Plaintiff objects to the said map both because it is not a true copy of the map which was there at the time that he and Adams talked, because that copy was marked, and because there is no proper foundation laid for introducing secondary evidence—there being no showing but what this witness could produce the other map. He may have it, and if he has it the original should be produced, or proof showing that it is lost; further because it is not a copy of that map, but a copy of a map of which that map was a copy. Objection sustained, and defendant excepts. Exception allowed.)

Mr. RODEN.—Q. Did Mr. Adams ever tell you that he claimed a fraction off the Prospector claim?

A. No, sir.

Q. Did he ever tell you that he had measured the Prospector and that there was an excess in it?

A. No, sir.

Q. And ask you to cast it off? A. No, sir.

Q. When did you first become cognizant of the fact that Adams claimed it was more than 160 acres?

A. During the winter of 1913 and '14. I think it was in January, 1914.

Q. That was after the commencement of this suit?

A. Yes, sir.

Q. At the time of the commencement of the suit, did you [74] have any knowledge or information that the Prospector contained more than 160 acres?

A. No, sir.



(Testimony of E. A. Austin.)

Q. After the suit was commenced, what did you do in the way of ascertaining the area contained in the Prospector?

A. I engaged Mr. Estmere to survey both the Prospector and the Mohawk Associations.

Q. Which was done?     A. Yes, sir.

Q. What was the result of the survey?

A. We found that the Prospector contained approximately 27 acres in excess.

Q. What did you do then?

A. I instructed Mr. Estmere to place stakes on both the north and the south lines of the Prospector, inclosing— Those stakes, taken with the end stakes of the Prospector, to include only 160 acres; in other words, to cast off the excess at the westerly end of the claim.

Q. Was that done?     A. Yes.

Mr. HILL.—We admit that at the time your notice says, he did attempt to cast off an excess.

Mr. RODEN.—Q. When was this excess cast off, do you remember?

A. What do you mean by “cast off”?

Q. When did Mr. Estmere, under your directions, set up those stakes at the westerly end line of the Prospector?

A. I think it was in January. The map is dated January 11th, 1914. I think that must be the date of the survey.

Q. Since January 11th, 1914, you have claimed no excess area.     A. No, sir.

Mr. RODEN.—Cross-examine. [75]

(Testimony of E. A. Austin.)

Cross-examination.

(By Mr. HILL.)

Q. You say that Mr. Adams didn't mention to you that this was a fraction of the Prospector.

A. Yes.

Q. And, when you say that, you mean that by "off" he meant that it was not taken from the Prospector?

A. Yes.

Q. That he didn't tell you it was a part of the Prospector. What you thought he meant was, that the Prospector stake didn't come up to the Mohawk stake. Was that it? A. Yes.

Q. You thought he meant that there had been some absolutely vacant ground between the Prospector and the Mohawk.

A. That the two stakes were not common.

Q. You thought that was it; that the two stakes were not common, A. Yes.

Q. That was when?

A. That was during the summer of 1912, probably in August.

Q. When did you first acquire an interest in the Prospector—your company?

A. I don't recall, but it was in the latter part of the summer. It was before November, 1912, or around that time.

Q. At the very time Adams was talking with you, you had been interested in purchasing interest in the Mohawk, hadn't you?

A. We had not acquired any at that time.

Q. But you were tracing it up and treating about

(Testimony of E. A. Austin.)

it? A. Yes, sir. [76]

Q. And you were also treating about purchasing an interest in the Prospector? A. Yes.

Q. You wouldn't say that you hadn't purchased an interest already in the Prospector?

A. Yes. We had not.

Q. Or you were simply contemplating it. Negotiations were on, and when Mr. Adams told you that he had a fraction in there, you didn't take occasion to look it up. A. Yes.

Q. Did you go to the stakes?

A. Yes. Not to the stakes. Not to all the stakes of the claim. I went to this stake (indicating on map) and found that the Prospector and the Mohawk stakes were at the same point. They were common stakes. There was a common corner for the two claims.

Q. Did you see the Anaconda stake at that time?

A. Yes.

Q. And you didn't take the trouble to go and find out where the other Anaconda stakes were, did you?

A. No, sir.

Q. You know at that time that Adams was claiming a fraction there 120 feet wide, didn't you?

A. Yes, sir. He told me that. He told me that he was claiming a fraction there and wished to sell it.

Q. He told you the size of it?

A. He probably did. I don't just recall.

Q. He marked it out for you on the map?

A. Yes, sir. Drew a sketch of it. [77]

Q. And some of the other owners of that ground

(Testimony of E. A. Austin.)

talked to you about that fraction about that time, didn't they?

A. I inquired from some of the owners. I can't recall who they were. I think Mr. Aitken is one, but I am not certain. I discussed it with some of the owners.

Q. Prior to that, William Lang had come to you. He also claimed to be an owner and was an owner, if there was an Anaconda Fraction. He had come to you before that. A. Yes, sir.

Q. He had also discussed with you the Anaconda Fraction. A. Yes.

Q. And Mrs. Carter, who was an owner, had discussed with you the Anaconda Fraction before that, hadn't she?

A. I am not certain about that.

Q. Or about that time?

A. I don't think Mrs. Carter owned an interest in the claim at that time.

Q. Possibly she didn't. But she was discussing with you, or did discuss with you about that time the Adams claim of a fraction there, didn't she?

A. I don't think she did, but still she may have. I am not certain.

Q. How long have you been manager of the Yukon Gold Company in this country?

A. Since June—Well, since early in 1912.

Q. What was your position before that?

A. Mining engineer.

Q. How long have you been a mining engineer?

A. That is a hard question to answer. [78]



(Testimony of E. A. Austin.)

Q. Don't mining engineers get a degree some way?

A. They generally do.

Q. Did you?      A. No, sir.

Q. Then you haven't any fixed period like that from which to date your entrance into the profession?      A. No, sir.

Q. About when did you become a mining engineer?

A. In the spring of 1906.

Q. You have been six years engaged as a mining engineer?      A. Yes, sir.

Q. All of that time familiar with mining?

A. I try to be.

Q. Familiar with the location of claims?

A. Yes, sir.      In a general way.

Q. And the only thing you knew about a fraction was that when a man claimed a fraction he meant there was a space between two claims.      Is that right?

A. No, sir.      That is not right.

Q. Then you knew a man could claim a fraction because of an excess area.      A. Yes.

Q. You didn't take the trouble to look it up?

A. To have taken the trouble to look what up?

Q. You are here complaining because another man did take the trouble to look it up.

(Defendant objects as argumentative. Sustained.)

Q. You did take the trouble to look it up, then?

A. I took the trouble to look up, and found out that the fraction did not lie between the Prospector and the Mohawk, which Mr. Adams claimed it did.

[79]

Q. You found out at that time that the two claims

(Testimony of E. A. Austin.)

adjoined, but you didn't take the trouble to find out if there was an excess area.      A. No, sir.

Q. But you went right ahead objecting, knowing that he claimed in there, without looking up the excess area.      A. Yes, sir.

Mr. HILL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. He never told you anything about excess area, did he?      A. No, sir. He did not.

Mr. HILL.—We object to that, as not proper redirect.

The COURT.—Objection overruled.

Mr. RODEN.—That is all.

Mr. HILL.—That is all. [80]

Thereupon it was stipulated by counsel for the plaintiff and counsel for the defendants, in open court, that this cause might be transferred to the Ruby calendar and further testimony introduced on behalf of either party at Ruby, Alaska.

Whereupon an adjournment was taken. [81]

**Testimony of John Beaton, for Defendants.**

JOHN BEATON, a witness called on behalf of the defendants, being first duly sworn, testifies as follows:

My name is John Beaton; I have resided at Otter Creek since the fall of 1908. I was at Otter Creek during the months of March or April, 1909. I know what is known as the Prospector Association. We were on that ground for the first time in September,

(Testimony of John Beaton.)

1908. We prospected there—panned below the mouth of Flat, on the rim side of the creek. By we, I mean Dikeman and me; William Dikeman, one of the defendants in this case. I staked the Prospector Association claim in April, 1909. William Dikeman was with me. We started and staked the claim, putting in an initial stake at the upper end of the Prospector, putting in a stake between four and five feet long, hewed on four sides. We wrote the location notice on it. I believe it started with the date, and “Know all men by these presents that the undersigned”—this date, whatever it was—and the staking this claim—whatever it was “known as the Prospector Association.” And it came then to the feet of ground, five thousand two hundred and eighty feet downstream to the lower center stake, and then we put on the other side “Six hundred and sixty feet to corner post,” and on the other side “Six hundred and sixty feet to the left limit.” We put eight names on the initial stake, myself, and Chittick’s name, and Tom Davis and Pillar’s. Chittick’s name was C. C. and Pillar’s William. Dikeman and Van Orsdall were also there and Dikeman put on Abe Blackburn. I cannot remember anyone else now.

Q. Did you put anyone by the name of Stanley on there?

A. Yes, there was Stanley. There was one more name on.

Q. A fellow by the name of Morrow?

A. Oh, Morrow, John Morrow, yes.

(Testimony of John Beaton.)

After that, we stepped the claim off to the lower end,—well, we put these corner stakes in first—measured the width of it 660 feet, Dikeman and I. I went to one side and stepped it off, and put in my post, and he stepped off to the other side and put his post down. They were marked “Left limit corner post of the Prospector Association” and we had “660 feet to the center initial stake”; and then “5,280 feet to lower corner stake of Prospector Association.” That is what we wrote on the corner stakes. I put that on the left limit, and on the right limit it said: “Upper corner stake of the Prospector Association, right limit, Otter Creek,” and “660 feet to center initial post.” Then on [82] another side, “5,280 feet to lower corner stake.” We went to these other corner stakes and blazed them, went all round the claim. We started at the upper end. I took one side, and Dikeman took the other, and staked one side. We just started from the initial post, and staked the upper end first, and then blazed along each side, one on each side, and then same at the lower end. We blazed so that a man could follow them and I have followed them. We went then and staked on the lower end. We put “The lower center stake of the Prospector Association” and then put the corner stakes in the same way as we did the upper end. We also wrote on the lower center stakes, “Lower center stake, 660 feet to lower corner stake, left limit” and then it says, “660 feet to the lower corner stake, right limit.” This stake was also about four or five feet, hewed on four corners—four sides. At the corners, we put in about the



(Testimony of John Beaton.)

same kind of stakes. These stakes took in all the ground we claimed. We did not do any more work on the claim until we got it recorded. We got it recorded in June, 1909. We let leases on the ground after we got back to the country again. We let a lease to Tom Davis in October, 1909. Tom Davis was the same Tom Davis, one of the locators. He sunk two holes that I know of, one seventeen feet and one fifteen feet. I panned there. Got some prospects—what we claimed then three cents. I have mined about fifteen years in Atlin, Fairbanks and here, and the Caribou country. From what prospects I saw there, I would be justified as a reasonable prudent man, in spending my time and money, with a reasonable expectation of developing a paying mine. Tom Davis sunk those two holes in January, 1910. I saw other work done there that year by Tom Davis. He tried to sink more holes. I do not think he got down on account of water. He got down from three to seven feet. I saw those holes. There was a party by the name of Olsen, Williams—I believe there was three of them—I don't know the third party, that worked there that same winter—years of 1909 and 1910. They worked until May, 1910, sinking holes. It seems to me they sunk seven or eight. They got holes to bedrock and I saw them, but did not pan there. They were from twelve to twenty feet, I guess. No one else mined there in 1910. In the year 1911, Chitticks worked there. I saw them,—C. C. Chittick and Andy, his brother. They started to turn the creek, and I be-

(Testimony of John Beaton.)

lieve they had a boiler on, and went to bedrock and done some sluicing. [83] They took out some dust, and did quite a few thousand dollars' worth of work, some time in the spring until late in the fall. I do not know if any work was done on that claim in 1912.

On cross-examination, the witness said: Dikeman and I located the ground. I made out the location notice. Dikeman's name was not on the stakes only as a witness. He was not on the notice we made out only as a witness.

Q. And you say you put in some names. What do you mean by that?

A. Well, our way of doing it: we were staking for other people that we know; that was all we were doing at the time—people we thought was worthy of staking something for them; and we were partners, so I took half of my friends, four, and him four of his.

Dikeman and I were partners prospecting. We were not jointly interested in the ground at that time. We were partners and we had no interest in the ground at the time. I put in four names and he put in four. We measured the ground—just stepped it off. I don't know if it was at all accurate or not; I have never measured it. I do not know whether we staked one hundred sixty or one hundred eighty acres, only as near as we could get at it, we were trying to get that an eight-claim association, as near as we could get to it, in the way we had of

(Testimony of John Beaton.)

finding out. Dikeman put in Blackburn and *and* John Morrow. I wrote those names on the location notice at that time. I believe we have it here. I am sure I wrote A. Blackburn, yes. Dikeman also put in Morrow, Van Orsdall and Stanley. I would not be able to tell you Stanley's initials. I could find out.

Q. Did you know those people?

A. I don't know them at all. I never saw any of them at that time. I had never seen Van Orsdall that I know of, to know him. I had been to Ophir Creek before that and I didn't know Blackburn there. Yes, I would know Morrow if I saw him.

Q. You wouldn't know whether these were real people or not then, all except Morrow?

A. No, the names was all I knew of, but I knew the other people very well. I knew C. C. Chittick about three years before that and he was not around when I was there. He was in the Fairbanks country. I knew Tom Davis well [84] for about three years; he was in the Fairbanks country. I knew William Pillars well. I had known him about eight years and was friendly with him. I know Jim Muckler well. I had seen him fourteen or fifteen years ago; known him fairly well in every camp I went to since, and he was the same Jim Muckler that died in Ruby this winter. I wrote those names on a location notice. I will try to explain. I wrote a location notice out, so when we got to Ophir, Dikeman took all the location notices that we wrote out and took them to Gaines Creek where Bill Taylor was, and got the notices made out over. He wrote

(Testimony of John Beaton.)

them over for us in the way we had them, so that the writing would be plainer and better, we thought. So Dikeman came back to Ophir in a couple of days, and I looked the notices over, and thought they were the same as we wrote them; and we sent them notices to the Commissioner then to get them on record—on Ophir. When I speak about writing the names on the notice, I mean the notice on the stake.

Q. You mean you wrote those names on the stake and Dikeman wrote part?

A. Yes. We wrote our location notices ourselves. I don't know whether they are in existence. Taylor copied ours, to make the writing plainer; that's what we did that for. I looked over the ones that Taylor copied and recorded them. I didn't know Stanley before we located, nor don't know him very much yet; don't know if I would know him if I saw him. Mr. Dikeman is supposed to be in Seattle. All I know about these people was they were supposed to be friends of Dikeman.

(Questions by Mr. HILL referring to original location notice.)

Q. Now this shows S. Blackburn, does it not?

A. That is "A"—I thought it was "A."

Q. And W. Stanley?

A. Stanley, yes. And I have A. Blackburn in another place. That shows "S." C. C. Chittick and Andy Chittick worked on this claim in 1911. They had a written lease from the owners that was around there at the time. I don't know how many of them, or who was there; I was there myself, and joined in



(Testimony of John Beaton.)

the lease. If I remember right, it was in 1911, in the spring some time. I can't get down to date with that, because I don't remember, but I think I could find proof of when they got it. I believe that they were around there in May. I don't know that they had started work in May. They dug their ditch, dam and [85] *and* that sort of thing under the lease and they dug that ditch and dam on the Prospector Association for the purpose of working the Prospector. I don't remember whether that was in May, some time in the beginning of—or it might be later—May or June, or some time in the beginning of spring.

Redirect Examination by Mr. RODEN.

I saw Jim Muckler last fall when I was going through Ruby—must have been about the first of October, or the last of September in the year 1913. He is the same Jim Muckler that I staked into the Prospector claim. He was poorly. He looked to me to be very sick, and he told me he was. I believe he was under the physician's care.

Mr. HILL.—We will admit that James Muckler died in Ruby last winter.

Mr. RODEN.—That is all we are trying to show.

Mr. McGINN.—What time?

Mr. HILL.—Couldn't say the exact date. I think it was about—

WITNESS.—About the 12th of March, I believe.

Mr. HILL.—I think it was March, somewhere along there.

(Testimony of John Beaton.)

WITNESS (in Reply to Questions by Mr. RODEN).—In December, 1913, I had no conversation with Mr. Adams, plaintiff in this case, at Otter Creek. I remember when Mr. Adams came up Otter Creek some time in the summer of 1913. I saw him. He didn't offer any of his property for sale to me anyway, or to anyone in my presence that I know of. I first became aware that there was an excess in the Prospector Claim last fall or summer, when this case started. I got knowledge of the fact that there was an excess claim when I got a summons and complaint. Prior to that time I did not know there was any excess of the Prospector Claim. In the summer of 1911, I was on Otter. I was there from the first of June to about the 25th of September. I was again on Otter Creek in 1912 and again in 1913. William Dikeman was not in the Otter Precinct in the year 1911. He was in Otter in 1912. I do not remember when he came into the precinct; he was there before I came. I came in about the 14th—somewheres about the first of September. Dikeman was going out when I was coming in. He was here again in 1913. He got here about the 25th of June on one of the first boats over Lake Lebarge. He stayed here until the fall; I believe he was here when I left. I left here about the ninth of September—or about the tenth of September—between the tenth or fifteenth, anyway. Dikeman was here at that time. [86] During all of the time I have lived on Otter Creek on Discovery; that is where the town of Otter is. My home is there, has always been there

(Testimony of John Beaton.)

while I was in here. When Dikeman has been here, it has been there. He has a home there, a building of his own. I do not know where Stanley was in 1911. I only know now what I hear. I saw him last in 1909. We were coming up the river and he was going down. I know when Tom Davis was here. I heard from him last in Fairbanks last summer. I believe he left here in the fall of 1911, but I am not sure—either that or 1912. I know William Pillars. He left here in 1911. He is in Fairbanks.

Upon cross-examination by Mr. HILL, the witness testified: I remember seeing Adams at Riley's in 1913 some time. I do not know if they were discussing some sale, and I do not remember what they did discuss. I walked into the office and they were in the office, and I didn't stay in there long anyway. I do not know what their talk was about. I was in the same room with the two of them for a short while. I did not know that the Prospector Claim was excessive. I do not know that I ever heard that it might be excessive. I did not hear about Adams being called a claim jumper down at the mouth of Flat, because he staked a fraction on the Prospector, and I never knew Adams at all till last summer and never heard of him until last summer. Last—whatever time I got this summons, this case started in. That was the first I knew anything about it. I often went down to see the ground between 1911 and 1913. I went by the corner of the Mohawk and the Prospector. I do not know if I went to their stakes. I do not think I did go.

(Testimony of John Beaton.)

Q. Did you ever notice any other stakes there, other than those you put there?

A. No—yes. I did not look to see what they were, Someone had put stakes at the corner. I saw some stakes there. I never noticed whether anyone had staked about 125 feet along the line we had blazed out. I never looked along the line for any stakes. I have been cruising back and forth since I have been to the camp. I do not know of any certain time that I followed the line around or anything like that. I never saw any strange stakes down there. Of course stakes didn't surprise me to see anywhere—there was so many of them. It would take a lot of my time to look for stakes and I didn't pay much attention to it. [87]

Q. Did you ever see anyone working on that ground just north—I believe it is—of the Mohawk line, north of the south line of the Prospector?

A. First spring there has been something done; there has been holes put down there, is the only thing I saw done. I have been outside every winter since 1909.

Q. Now, in the spring of 1912, when you went by there, you saw where there had been new holes put down on the Prospector, just a little north of the south line of the Prospector, did you not?

A. I noticed holes put down right along, but I didn't pay attention enough to know. We put them down—there was different people putting holes down. Flat City is on that claim, and I don't know



(Testimony of John Beaton.)

that I could say I saw a tent there—still, I saw lots of tents.

Q. Now, Flat City isn't on the end of the claim that is right up by the Mohawk, is it?

A. Well, it is towards the end.

Q. Now, isn't that end of the claim by the Mohawk away up there by some wood piles, some seven hundred or eight hundred feet from Flat City?

A. I don't know where the line of the Mohawk comes. I know where the southern line of the Prospector is. I believe it joins the Mohawk. It is south of the town of Flat, not very much. I would not say it was at least seven hundred feet.

Q. Would you say it was a thousand feet south?

A. No, sir.

Q. Would you say it is over four hundred?

A. I wouldn't say but what it is. I really wouldn't say just how far it is. I know where I put that stake.

Q. Now, there is quite a vacant space between the town of Flat, or any of the buildings, and the corner of the Prospector?

A. Yes. I never went to read any of the Adams' stakes. Since the commencement of this action, I have seen them. I understood they were Adams' stakes. I believe I did notice them since this action. I was down there, and I don't know if I took any particular notice of them. I know they were there, and I know about what ground is covered by Adams' location. I didn't see a tent inside of that ground that is covered by Adams location in the spring of

(Testimony of John Beaton.)

1913 or the spring of 1912. [88] I never paid any attention to know that I saw a tent there. I don't really know that I did. I did not pay any attention to the shaft.

Q. And the same stakes you recognize as Adams' stakes now, you saw there before this action commenced, didn't you?

A. I never went up to the stakes to look at them; I went by them. I do not think I ever saw the same stakes. I don't think—if I did, I never went up to read what is on, or anything.

Upon redirect examination by Mr. RODEN, the witness testified: I am not conscious of ever having seen any of Adams' stakes.

### **Testimony of J. E. Riley, for Defendants.**

Whereupon J. E. RILEY, a witness called for the defendants, being first duly sworn, upon examination by Mr. RODEN, testified as follows:

My name is J. E. Riley. I am a miner working on Otter Creek. I remember in the summer of 1913, I had a conversation with Mr. Adams, concerning the sale and purchase of some mining claims. That conversation took place on Discovery, down near the cut. Mr. Adams and myself were present. Mr. Beaton was not present. No conversation took place in my office in my house in regard to any ground.

Cross-examination by Mr. HILL.

Q. Was this the same day that you had a conversation with Adams down in the cut, and then did you

(Testimony of J. E. Riley.)

have another conversation with him up in the house?

A. No, in regard to any ground. We talked on the way up from the cut to the house. Mr. Beaton was there transacting some other business.

Upon Redirect Examination by Mr. RODEN, the witness testified as follows: Adams passed my place sometimes. I met him one day and he said he wanted to talk over—He had never been out there any other time talking about his properties.

**Testimony of Charles Kreutzinger, for Plaintiff.**

Thereupon CHARLES KREUTZINGER, a witness called for and in behalf of the plaintiff, being first duly sworn, testified, upon examination by Mr. HILL, as follows:

I have lived in Otter Precinct since the spring of 1910. I know Sam Adams, Cas. Chittick, James Muckler, Star Ballard, William Lang. I was present in 1911, along about the first of April, I should judge, at a conversation between Sam Adams, Cas. Chittick and Jim Muckler, regarding the location of the fraction off the Prospector. Sam Ballard was present and [89] Muckler and Chittick and myself,—and I think a couple of others, but I don't recollect. This conversation took place in the office of the Conley Saloon.

Q. What was that conversation, as nearly as you recollect?

Objected to by Mr. McGinn for the defendants, on the ground that it was incompetent and hearsay and not binding on the defendant in this case. That it is immaterial; it is not evidence of any fact, and

(Testimony of Charles Kreutzinger.)

take a certain part of this claim, that it is within the Statute of Frauds.

Objection overruled.

WITNESS.—Well, it was in regard to staking some excess. I couldn't state word for word because I don't recollect; as I recollect it, is the best I can do. Well, Adams told, as I recollect, that the claim was in excess of 160 acres, and if they had any objection to his staking the excess, and they said "No," as I recollect. I know that both of them agreed to—they were perfectly well willing that if there was over 160 acres, that it should be taken off.

(Mr. McGinn objected to that as a conclusion, and moved that it be stricken.)

COURT.—*I may stand.*

WITNESS.—They said he could stake any place.

Upon cross-examination by Mr. RODEN, witness testified:

I have known Sam Adams since 1910 and have known him ever since. Our relations have been quite friendly. No, I don't think we had business relations together—not to my knowledge.

Q. Well, you and he worked there on that Chicago Bench?

A. No, sir, I had nothing to do with the Chicago Bench whatsoever. I never worked on there. I was up there one afternoon. No, Adams wasn't up there.

Q. That was after Adams had relocated the claim there too, wasn't it?

Mr. HILL.—Objected to as incompetent, irrel-



(Testimony of Charles Kreutzinger.)

evant and immaterial. Objection overruled.

A. I believe it was and that was the time there was trouble up there about jugging Adams. I was up there in the afternoon but I wasn't jugged. I was arrested in Flat the next day for trespassing on that property. I did not live with Adams in the same cabin in Flat. I lived with Drew—Charlie Drew's cabin. Adams did not live in the cabin when I was there. He and I never [90] lived in the same cabin together. I lived in the same cabin he had lived in.

Q. Now, how did you happen to recollect this conversation with Chittick?

A. Well, I was over to Flat and I recollect this conversation. On the first of April, 1911, I was not acquainted with the Prospector Association. I was acquainted with Cas Chittick just to see him. I don't know what he was doing. I just knew who he was. I don't know how. I knew his name was Chittick—possibly that winter. I don't know where he was living at that time. I had seen him on Flat before that occasion. I was out to Flat on the first of every month, and it was during some of the times that I was there that I seen him. I had seen him prior to the trip on the first day of April, if I recollect right. I knew who Jim Muckler is. I knew him just to see him; much the same way I had become acquainted with Chittick. We all did talking on this occasion.

Q. Well, what did you say?

A. I said, "Bring us another one," if I recollect.

(Testimony of Charles Kreutzinger.)

Q. I am asking you what you said about this Prospector claim on that occasion.

A. Well, I have stated all I said at that time. Adams was asking Muckler about the claim. Adams said that the claim was in excess; I wouldn't be sure that he said "excess." He said it was too big, or in excess. I wouldn't be sure. I am quite sure he said it was in excess.

Q. Did he say to them that he had measured the claim?

A. No, not to my recollection. I don't know whether or not I would recollect if he had said it. Both of them answered Adams in this conversation. Muckler said it was all right with him. Chittick said similar. I don't recollect just what it was. Chittick said, to my recollection, that it was all right. I don't recollect whether they were all in the saloon or not, when I came in. I was in there collecting a bill. I had no interest in the matter at that time. This conversation took place at the time in the office, possibly they were all sitting in the office. I am not sure that they were. We all went out together and at one time we were all in the office together. I am positive that this conversation took place in the office. Sam Ballard was there. I don't recollect whether the bartender was in there or not. [91] I don't recollect how long I had been there when Muckler and Chittick came in. I don't recollect who came in first. I recollect the talk about this excess. They talked about this claim being too big—the Prospector Claim. I remember that positively. It was in the

(Testimony of Charles Kreutzinger.)

evening when they had this conversation. They stayed there an hour, maybe. The conversation was about mining. I don't recollect word for word.

Q. The only thing you can recollect is that you are positive about the excess?     A. Yes.

Q. Nothing else that you can recollect?

A. No, sir, I don't recollect it. I have no interest in this fraction now. There are no business relations existing between me and Adams. I am not a co-owner with him in any ground. I understand C. C. Chittick was lost on the trail a year ago. I didn't know whether Jim Muckler was dead or not. I heard in the courtroom this afternoon he was dead. That is the first time I heard it. I have seen him since that conversation. I seen him the day he went out on the boat. It was 1912 or 1913; I would not be positive. I am positive that this conversation took place on the first of April 1910. The matter never was called to my attention since. I never spoke about this conversation until here this afternoon. I didn't talk it over with Adams. I didn't talk it over with his lawyer.

Q. Never was mentioned at all.

A. No, sir. Adams told me he wanted to use me as a witness. He didn't tell me what he wanted me to testify about. I didn't talk about this until I came here this afternoon. [92]

Thereupon pursuant to stipulation between the plaintiff and defendant, said stipulation is as follows: [Caption and Title.]

**Stipulation Re Deposition of Walter Rowson, for Defendant.**

It is hereby stipulated by and between the plaintiff above named, and Yukon Gold Company, a corporation, John Beaton and W. A. Dikeman, defendants above named that the deposition of Walter Rowson, a witness for the above-named defendants, may be taken before any notary public in and for the Territory of Alaska, and when so taken may be certified by such officer and returned to the office of the Clerk of the District Court, Fourth Judicial Division, Territory of Alaska, and used as testimony at the trial of the above-entitled action by the said defendants, subject to all objections that may be made thereto by the plaintiff.

Iditarod, June 19th, 1915.

E. COKE HILL,

Attorney for Plaintiff.

HENRY RODEN,

Attorney for Defendants, Yukon Gold Company,  
Beaton and Dikeman.

The defendant read the deposition of Walter Rowson, who being first duly sworn, testified as follows:

**Deposition of Walter Rowson, for Defendant.**

My name is Walter Rowson, Fairbanks, Alaska; by profession a court reporter, but at present engaged in mining. During the summer of 1914, I was Official Court Reporter and Judge's Secretary in the District Court for the Fourth Division of Alaska. I have been engaged in court reporting for a period



(Deposition of Walter Rowson.)

of almost eight years; first in the Civil, Criminal and Surrogate Courts at Toronto, Ontario, afterwards in the Superior Court for Chehalis County, Washington, and latterly in the District Court for the Fourth Division of Alaska. I reported and took the stenographic notes of the evidence and testimony given in that certain action entitled "S. C. Adams, Plaintiff, vs. [93] Yukon Gold Company, W. A. Dikeman, John Beaton and others, defendants, No. 152 I, in the District Court, Territory of Alaska, and tried during the summer of 1914 at Iditarod, Alaska, before Hon. Frederic E. Fuller, Judge of the said Court. I have in my possession the notes of the evidence and testimony taken by me in the aforesaid case, and they have heretofore, since the trial of the cause, been in the possession of the District Court at Fairbanks, Alaska. I can find in said notes, the evidence and testimony given by one A. A. Chittick, the said testimony being as follows:

#### SURREBUTTAL.

##### **Testimony of A. A. Chittick, for Defendants (In Surrebuttal).**

A. A. CHITTICK, called for and on behalf of the defendant, being first duly sworn, testified as follows:

My name is A. A. Chittick. My business is mining; I have been in this precinct since 1909. C. C. Chittick was a brother of mine. He was here in 1910; he came here then. He is dead now—he is supposed to be. I saw him last on the twenty-fifth of January, 1913, at Susitna. In the year 1910, C. C.

(Testimony of A. A. Chittick.)

Chittick and I were partners in everything,—in mining, and after his wife was running a roadhouse at the mouth of Otter Creek. C. C. Chittick did no mining on the Prospector Association in the year 1910. He did do prospecting on the Prospector Association in 1911 in September. He went on that claim first about the last week in May. We finished turning the creek and made a dam. I think it was the last week in May. C. C. Chittick did not sink any shafts on the Prospector Association in 1910 nor in 1911. In the fall of 1911, he started a cut to change the bed of the creek. He did some of the work, and had quite a few men. His work consisted of sluicing. He did some work there after January 1st, 1912. I was there with him and sunk five shafts. I was with him in 1911, too, along from about the 8th of July. I know from my own personal knowledge that he didn't sink any shafts on the Prospector Association in the year 1911.

Q. Now, in the year 1911, say in the month of September, did you have any conversation or meeting with C. C. Chittick relative to a conversation supposed to have taken place between him and one L. C. Adams, in which the subject of the location of a fraction of the Prospector claim by Adams came up?

Mr. Hill objected to that unless Adams was present. It is attempting [94] to prove statements to their interest. That is not competent.

The COURT.—Just ask whether or not there was any conversation. That may be answered or not.

(Testimony of A. A. Chittick.)

Mr. RODEN.—Did any such conversation take place?

A. It did, in Flat City, at our house; at our home, C. C. Chittick's and mine. I don't think there was anybody but myself present at the time.

Objection by Mr. Hill as not in any way binding upon plaintiff, and strictly hearsay. It is simply a conversation concerning some other conversation.

Objection sustained. After argument:

COURT.—I think the shortest way is to allow the question to be answered, subject to your objection, Mr. Hill.

A. He said in regard to Adams staking the fraction, that he had met Adams, and he had said that he had staked a fraction off of the Prospector Association; and he said he had met Adams, who had said: "I have staked a fraction on the Prospector Association, so I don't suppose we shall be very good friends now." And my brother said: "I don't see that that will make any difference as to our being good friends. If the Prospector was in excess of 160 acres, I would just as soon see you stake it as anybody else." I should judge this conversation took place in September, 1911.

Q. Now, in reference to this conversation; did your brother say what he had told Adams with reference to casting off on the Prospector, in case there were any?

Mr. Hill objected to that as incompetent and irrelevant, and as not tending to prove or disprove any

(Testimony of A. A. Chittick.)

conversation which C. C. Chittick may have had with Adams.

WITNESS.—(Continuing.) I asked him what he had done about it, and he said he had asked Adams located it between the Prospector and the Mohawk where he had located it, and Adams told him he had Association; and my brother said he didn't think that there would be any fraction exist there, not by his consent; he thought he understood in Fairbanks that the first staker had the right to any where the first fraction should be set off, and not by his consent would it be set off there; that he could have it on the side, or on the lower end, that is if one existed. [95]

Mr. Hill objected to that. Objection sustained.

WITNESS. — (Continuing.) I know James Muckler. I saw him on the Prospector Association during 1910 and 1911, and different times I was there. I had a talk with him about the Prospector, in regard to the claim; and he told me he and Dikeman and somebody else had measured the claim, and it was 13 acres short of 160 acres. That conversation was some time after—

Mr. Hill objected to that; he did not see what the purpose was.

COURT.—Objection overruled.

WITNESS.—(Continuing.) It was after my brother told me about his staking the fraction. I don't think it was over a year.

Upon cross-examination by Mr. HILL, the witness testified as follows:



(Testimony of A. A. Chittick.)

I was here in April, 1911. I lived at the mouth of Otter. I wasn't living at Flat. I might have been there. My home is at the mouth of Otter Creek. My brother might have been there too at that time, but he wasn't doing any work there. He might have been at Flat on or about the first of April, 1911.

Q. As far as you know he was?

A. As far as I know, he wasn't. I couldn't say whether he was or not. [96]

Thereupon it was stipulated as follows:

For the purpose of this suit and for no other purpose it is stipulated between the parties hereto, that is the plaintiff S. C. Adams and defendants Yukon Gold Company, W. A. Dikeman and John Beaton, that on the date of the location of the "Anaconda Fraction" described in the pleadings herein, the following named persons were the owners of the Prospector Association claim mentioned in the pleadings herein, and that their interest in said claim were as set forth after their names, respectively, viz: W. A. Dikeman, 3/16ths; John Duncan, 1/16th; Ira Van Orsdale, 1/16th; P. F. Stimley, 1/16th; Tom Davis, 1/16th; John Beaton 2/16th; James Muckler, 1/8th; Wm. Piller, 1/16th; S. Blackburn, 1/8th; and C. C. Chittick, 1/8th.

That on the date of the location of the "Anaconda No. 2" mentioned in the pleadings herein, and at the commencement of this suit, the following named persons and corporation were the owners of said Prospector Association claim and that their interest therein as set forth after their names, re-

spectively, viz: Yukon Gold Co., 8/16th; W. A. Dikeman, 3/16; John Beaton, 3/16th; Tom Davis, 1/16th; and James Muckler, 1/16th; and that as far as defendants Yukon Gold Co., W. A. Dikeman and John Beaton are concerned they are now the owners of the same interests and further that defendant Yukon Gold Co. upon the filing of this stipulation and the order of the Court, may withdraw the deeds introduced in evidence by said Company upon the trial of this cause establishing its title in said premises as hereinbefore set forth.

E. COKE HILL,

Plaintiff's Attorney.

HENRY RODEN,

Attorney for Defendants, Yukon Gold Company,  
W. A. Dikeman and John Beaton.

Thereupon plaintiff and defendants rested, and the testimony closed.

The service of the foregoing proposed Bill of Exceptions by receipt of copy is hereby acknowledged at Ruby, Alaska, this 20th day of April, 1917.

HENRY RODEN,

Attorney for Defendants.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th. Div. Apr. 20, 1917. J. E. Clark, Clerk. By Thomas J. DeVane, Deputy.

Filed in the District Court, Territory of Alaska, 4th Div. Aug. 27, 1917. J. E. Clark, Clerk. [97]

[Caption and Title.]

**Order Setting Time for Filing and Serving Bill of  
Exceptions.**

Now, on this day, upon stipulation of the respective counsel herein,—

IT IS ORDERED that counsel for plaintiff have six (6) months from the 16th day of August, 1916, in which to prepare, file and serve his Bill of Exceptions herein.

CHARLES E. BUNNELL,  
District Judge. [98]

---

[Caption and Title.]

**Stipulation Extending Time to May 1, 1917, to  
Prepare, etc., Bill of Exceptions.**

It is hereby stipulated by and between the plaintiff and defendant acting by their respective counsel, that the plaintiff may have until May the first, 1917, within which to prepare, serve and file his bill of exceptions in said cause, and that the Court hereafter enter an order *nunc pro tunc* extending said time.

Done February 9th, 1917, by telegram.

E. COKE HILL,  
Attorney for Plaintiff.

HENRY RODEN,  
Attorney for Defendants. [99]

Signal Corps, United States Army.

TELEGRAM.

WASHINGTON-ALASKA MILITARY CABLE  
AND TELEGRAPHIC SYSTEM.

SEND THE FOLLOWING MESSAGE:

Fairbanks, Feb. 9, 1917.

Henry Roden,

Juneau, Alaska.

Court and Wolcott both away, will you stipulate  
may have till May first file bill exceptions in Adams  
versus Yukon Gold. Please answer immediately.

E. COKE HILL.

[Indorsement.] [100]

---

Signal Corps, United States Army.

WASHINGTON-ALASKA MILITARY CABLE  
AND TELEGRAPH SYSTEM.

TELEGRAM.

19v g 10 night

Received at

Juneau Als Feb 10, 1917,

E. Coke Hill,

Fairbanks.

You may have till May first file bill of exceptions.

RODEN.

306p. [101]

---

[Caption and Title.]

**Stipulation Extending Time for Filing of Proposed  
Bill of Exceptions, etc.**

It is hereby stipulated by and between the plain-



tiff and defendants acting by their respective counsel that the defendants may have 30 days from the date of filing plaintiff's proposed bill of exceptions in which to file exceptions and amendments thereto.

Done this 20th day of April, 1917.

E. COKE HILL,

Attorney for Plaintiff.

HENRY RODEN,

Attorney for Defendants.

[Indorsement.] [102]

---

[Caption and Title.]

**Suggested Amendments to Proposed Bill of  
Exceptions Filed by Plaintiff.**

Come the defendants, Yukon Gold Company, a corporation, John Beaton and W. A. Dikeman, and propose the following amendments to the proposed bill of exceptions filed by the plaintiff herein, to wit:

1st. Amendment suggested: Insert in said proposed bill of exceptions all the testimony given by the plaintiff S. C. Adams, as a witness in his own behalf.

2d. Amendment suggested: Insert in said proposed bill of exceptions the original map of the premises described in the pleadings herein, as used upon the trial of this cause or a duly prepared true copy thereof.

3d. Amendment suggested: Insert in said proposed bill of exceptions all the testimony given by E. A. Austin, a witness for the defendants.

4th. Amendment suggested: Insert in said pro-

posed bill of exceptions all the testimony given by the witness John Beaton, on behalf of defendants.

HENRY RODEN,

Attorney for Defendants Yukon Gold Co. John Beaton and W. A. Dikeman.

[Indorsement.] [103]

---

[Caption and Title.]

**Affidavit of Service of Suggested Amendments to  
Proposed Bill of Exceptions.**

United States of America,  
Territory of Alaska,—ss.

Henry Roden, being first duly sworn, on his oath deposes and says: I am a person over the age of twenty-one years; that on the 23d day of April, 1917, at Ruby, Alaska, I served upon E. Coke Hill, Esq. attorney for the above-named plaintiff in the above-entitled cause, a true, correct and complete copy of the “suggested amendments to proposed bill of exceptions filed by plaintiff,” by leaving a true copy thereof at the office of the said E. Coke Hill, in the aforesaid town of Ruby, Alaska, that being the place where the said E. Coke Hill transacts his business.

I do further depose and say that on the 23d day of April, 1917, I left a true correct and *complete* of said “suggested amendments to proposed bill of exceptions filed by plaintiff” at the office of the clerk of the above-entitled court in said town of Ruby, and deposited with said clerk the said copy for and as service upon the said E. Coke Hill, Esq., as attorney for the plaintiff herein, and for his use and benefit.

Deponent further says that he is the attorney for the defendants Yukon Gold Company, John Beaton and W. A. Dikeman, and as such prepared the said "suggested amendments to proposed bill of exceptions filed by plaintiff."

HENRY RODEN. [104]

Subscribed and sworn to before me this 23d day of April, 1917.

[Seal]

JOHN W. DUNN,

Notary Public in and for Alaska.

My commission expires June 22, 1918. [105]

---

[Caption and Title.]

**Notice of Hearing of Settlement of Bill of  
Exceptions.**

To E. M. Stanton and Henry Roden, Attorneys for  
the Above-named Defendants:

You and each of you will please take notice that on the 30th day of July, 1917, at the hour of two o'clock P. M. of said day, or as soon thereafter as counsel can be heard, in the room occupied by the above-entitled court at Ruby, Alaska, plaintiff will call up for settlement its bill of exceptions and any objections thereto that may have been filed.

E. COKE HILL,

Attorney for Plaintiff.

[Indorsement.] [106]

[Caption and Title.]

**Hearing on Defendant's Amendments to Proposed  
Bill of Exceptions.**

Now, on this day, this cause came on for hearing upon the suggested amendments to the plaintiffs proposed Bill of Exceptions; E. Coke Hill appearing as counsel for the plaintiff and Henry Roden appearing as counsel for the defendants, and after argument thereon, the Court being fully and duly advised in the premises,—

IT IS ORDERED that the defendants first suggested amendment be, and is hereby granted; that the second suggested amendment be, and is hereby denied; upon stipulation by counsel, that the original map filed as an exhibit in this cause be included in the transcript on appeal; that the third suggested amendment be, and is hereby granted; that the 4th suggested amendment be, and is hereby denied.

CHARLES E. BUNNELL,  
District Judge. [107]

---

[Caption and Title.]

**Order Settling Bill of Exceptions.**

This cause having been brought on regularly for hearing upon the application of the plaintiff for settling and certifying his bill of exceptions lately filed herein and the time for filing said bill of exceptions having been duly extended by an order of this court and stipulation of counsel until and including the



day upon which was filed, and the time for settling same having been extended to include this day, and the defendants having filed their proposed amendments to plaintiff's proposed bill of exceptions and a hearing having been had thereon and an order of Court made allowing certain of the said proposed amendments and refusing to allow others, and the plaintiff's proposed bill of exceptions having been amended to conform to the Court's said order,—

NOW, THEREFORE, on motion of plaintiff's attorney, it is hereby ordered that said proposed bill of exceptions as now amended be settled as the true bill of exceptions in this cause, and the same is hereby certified by the undersigned, the Judge who presided at the trial of this cause, to be the true bill of exceptions in said cause and to contain all the material evidence given at the trial of said cause, and the clerk is hereby directed to file the same as a part of the record in said cause with this certificate.

Done this 27th day of August, 1917, at Ruby, Alaska.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 1, page 504. [108]

[Indorsement.] [109]

---

[Caption and Title.]

**Assignment of Error.**

Come now the plaintiff above-named and files the following assignment of errors upon which he will rely his appeal from the decree made by this Honor-

able Court on the 16th day of August, A. D. 1916, in the above-entitled cause:

I.

That the said Court erred in making the following finding of fact contained in the fourth paragraph of the said findings of fact in the above-entitled cause, to wit: "That some of the co-owners in said Prospector claim were well known in the vicinity where said premises are situate and were living in close proximity thereto," for the reason that the said finding is not supported by the evidence.

2.

That the Court erred in making the following finding of fact contained in the sixth paragraph of the findings of fact in the above-entitled cause, to wit: "That as marked upon the ground the said Anaconda Fraction lies wholly within the exterior boundaries of the said Prospector Association Claim, and none of its boundaries cover or adjoin any boundary line of said Prospector Association Claim; and the said Anaconda Fraction is not located either at one end or one side of said Prospector claim," for the reason that said finding is not supported by the evidence, in this, that the evidence shows that the southerly line of the Prospector Association was blazed and that the southerly and easterly lines of the Anaconda Fraction coincided with the southerly and easterly lines of the Prospector as marked upon the ground. [110] And the evidence shows that the plaintiff did locate said Anaconda Fraction off one side or end of the said Prospector Association.

## 3.

That the Court erred in making the following finding of fact contained in the seventh paragraph of said findings of fact in the above-entitled cause, to wit: "That on the 19th day of July, 1913, and while the said Prospector Association claim was a valid subsisting placer mining claim, and while the locators thereof and their grantees, except the locators Huckler and Chittie, had no notice or knowledge of the fact that said Prospector claim contained an area in excess of 160 acres, plaintiff herein entered ——," for the reason that said finding is not supported by the evidence in this, that the evidence shows that Yukon Gold Company, a corporation, one of the grantees of the locators of the Prospector Association Claim had notice of the claim of the plaintiff sufficient to charge it with the duty of investigating the area of the Prospector Association, and that said evidence shows that the officers of said corporation or some of them had notice of the excessive area of the said Prospector Association.

## 4.

That the Court erred in making the following finding of fact contained in the seventh paragraph of said findings of fact in the above-entitled cause, to wit: "That the southerly boundary line of said Anaconda Fraction Number Two is not coextensive with the southerly boundary line of said Prospector claim," for the reason that the evidence does not support said finding but shows that the said southerly boundary line of the said Prospector Association was blazed and the southerly boundary line of the Ana-

conda Fraction Number Two coincided with said southerly boundary line of the said Prospector Association.

## 5.

That the Court erred in making the 8th finding of fact, for the reason that it is against the evidence in this that the evidence shows that plaintiff did make the said two locations on and off [111] one end of side of the said Prospector claim as he was requested to do by said Muckler and Chittic.

## 6.

That the Court erred in making the following finding of fact contained in the 13th paragraph of said findings of fact in the above-entitled cause, to wit: "That the locators and their grantees of said Prospector Association Claim except said Muckler and Chittic did not acquire notice of the fact that said claim contained an area in excess of 160 acres until after the commencement of this action," for the reason that the said findings is against the evidence in this, that the Yukon Gold Company one of the grantees of the locators of the said Prospector's Association did acquire notice of the fact that said claim contained an area in excess of 160 acres before the commencement of this action.

## 7.

That the Court erred in making the following conclusions of law, to wit, conclusions contained in paragraphs numbered 1st, 2d and 3d, wherein the Court finds that the "Pretended location of said Anaconda Fraction and said Anaconda Fraction No. 2 were and are null and void," and wherein the



Court finds that the defendants herein were and they now are the owners in fee of the premises described in their answer, to wit, the Prospector Association Claim as the said claim is now marked upon the ground and described in the amended location notice thereof, and that said defendants then had and they now have and they were then and they now are entitled to the sole and exclusive possession of the said premises, and that the plaintiff had not at the time of the commencement of this action and has not now any right, title or interest therein or in or to any part thereof, nor the right to the possession thereof or any part thereof; and wherein the Court finds the defendants Yukon Gold Company, W. A. Dikeman and John Beaton are entitled to the relief prayed for in their answer, for the reason that said conclusions [112] of law are against the law and the facts.

## 8.

That the Court erred in dismissing said suit and entering a final decree in favor of the defendant, Yukon Gold Company, W. A. Dikeman and John Beaton for their costs and disbursements against said plaintiff.

## 9.

That the Court erred in not making and entering its findings of fact, finding that the locators of the Prospector Association Claim or their grantees had notice of the excess area contained within the exterior boundaries of said association and failed to cast off such excess within a reasonable time after said notice.

## 10.

That the Court erred in not finding as a fact that the plaintiff did locate a portion of the excess area of the said Prospector Association in accordance with the request and consent of the said Muckler and Chittie off the southerly side of the said Prospector Association.

## 11.

That the Court erred in not finding as a conclusion of law from the facts proven and found that the consent of Muckler and Chittie that the plaintiff might locate any excess area contained within the boundaries of the Prospector Association Claim off any side or end that he wished was binding upon the covenants of the said Muckler and Chittie in the said Prospector Association, and that the said location by plaintiff of the said Anaconda Fraction and the said Anaconda No. 2 Fraction was a good, valid subsisting location thereof, and that the said plaintiff was, at the time of the commencement of said action, the owner of the ground contained in said locations and entitled to the possession thereof. [113]

## 12.

That the Court erred in not making and entering a decree in favor of the said plaintiff, S. C. Adams, and against the said defendants, Yukon Gold Company, W. A. Dikeman and John Beaton, adjudging the plaintiff to be the owner of and entitled to the possession of the said Anaconda Fraction and the said Anaconda Fraction No. 2, in accordance with the prayer of plaintiff's complaint.

WHEREFORE plaintiff prays that the said decree be reversed and the District Court for the Territory of Alaska, Fourth Division, be instructed to enter such a decree as is prayed for in his complaint.

E. COKE HILL,  
Attorney for Plaintiff.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 15, 1917. J. E. Clark, Clerk. [114]

---

[Caption and Title.]

**Petition for Appeal.**

To the Honorable CHARLES E. BUNNELL, Judge  
of the District Court for the Territory of  
Alaska, Fourth Judicial Division:

The above-named plaintiff, S. C. Adams, feeling himself aggrieved by the decree made and entered in this cause on the 6th day of August, A. D. 1916, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California.

And your petitioner further prays that the proper order touching the security to be required of him

to perfect his appeal be made.

E. COKE HILL,  
Attorney for Plaintiff.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Five Hundred Dollars.

Dated at Ruby, Alaska, this 15th day of August, 1917.

CHARLES E. BUNNELL.  
District Judge. [115]

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 15, 1917. J. E. Clark, Clerk. [116]

---

[Caption and Title.]

**Bond on Appeal.**

Know All Men by These Presents: That we, S. C. Adams, as principal, and Arnulf Haarvei and H. W. McCray, as sureties, acknowledge ourselves to be jointly indebted to the Yukon Gold Company, a corporation, W. A. Dikeman, John Beaton, Thos. P. Aitken, Rae B. Carter, P. F. Stimley and Tom Davis, appellees in the above-entitled cause, in the sum of Five Hundred (\$500.00) Dollars, conditioned that, whereas, on the 16th day of August, A. D. 1916, in the District Court of the United States for the Territory of Alaska, Fourth Judicial Division, in a suit depending in that court, wherein S. C. Adams was plaintiff, and the Yukon Gold Company, a corporation, W. A. Dikeman, John Beaton, Thos. P. Aitken, Rae B. Carter, P. F. Stimley and Tom



Davis, were defendants, numbered on the docket of said court as 32-R., a decree was rendered against the said S. C. Adams, and the said S. C. Adams having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Yukon Gold Company, a corporation, John Beaton, Thos. P. Aitken, Rae B. Carter, P. F. Stimley and Tom Davis, citing and admonishing [117] them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the 1st day of November A. D. 1917, next.

NOW, if the said S. C. Adams shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Dated this 15th day of August, 1917.

S. C. ADAMS,

Per E. C. HILL,

ARNULF HAARVEI,

H. W. McCRAY,

Sureties.

Approved August 15th, 1917.

CHARLES E. BUNNELL,

District Judge.

[Indorsement.] [118]

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

United States of America,  
Territory of Alaska,  
Fourth Division,—ss.

I, J. E. Clark, Clerk of the District Court for the Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 121 pages, numbered from 1 to 121, inclusive, constitute a full, true and correct transcript of the record on appeal in cause No. 32-R, S. C. Adams, Plaintiff and Appellant, vs. Yukon Gold Company, a corporation, W. A. Dikeman, John Beaton, Thos. P. Aitken, Rae B. Carter, P. F. Stimley and Tom Davis, Defendants and Appellees, and was made pursuant to and in accordance with the praecipe of the appellants filed in this action, and made a part of this transcript, and by virtue of the Citation issued in said cause, and is the return thereof in accordance therewith, and I certify that the Citation, annexed hereto, is the original thereof; and I do further certify that the index consisting of pages i to ii, is a correct index of said transcript on appeal; also that the cost of preparing said transcript and this certificate, amounting to forty-six and 10/100 dollars (\$46.10), has been paid to me by counsel for appellants in this action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court this 24th

day of September, A. D. 1917.

[Seal]

J. E. CLARK,

Clerk of District Court, Territory of Alaska, Fourth  
Division. [119]

---

[Caption and Title.]

**Citation on Appeal.**

The United States of America, to the Yukon Gold Company, a Corporation, W. A. Dikeman, John Beaton, Thos. P. Aitken, Rae B. Carter, P. F. Stimley and Tom Davis, Defendants, Greeting:

You and each of you are hereby notified that in a certain case in equity in the United States District Court, for the Territory of Alaska, Fourth Judicial Division, wherein S. C. Adams is plaintiff and the Yukon Gold Company a corporation, W. A. Dikeman, John Beaton, Thos. P. Aitken, Rae B. Carter, P. F. Stimley and Tom Davis are defendants, and appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear before the said court at San Francisco, State of California, seventy-five days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.  
[120]

WITNESS the Honorable CHARLES E. BUNNELL, Judge of the United States District Court

for the Territory of Alaska, Fourth Judicial Division.

Dated this 15th day of August, 1917.

CHARLES BUNNELL,

District Judge.

Service of above citation by receipt of a true copy thereof is hereby admitted this 15th day of August, 1917.

HENRY RODEN,

Attorney for Defendants.

[Indorsement.] [121]

---

[Endorsed]: No. 3058. United States Circuit Court of Appeals for the Ninth Circuit. S. C. Adams, Appellant, vs. Yukon Gold Company, a Corporation, W. A. Dikeman, John Beaton, Thomas P. Aitken, Rae B. Carter, P. F. Stimley and Tom Davis, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filed October 9, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.





No. 3058

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

S. C. ADAMS,

*Appellant,*

VS.

YUKON GOLD COMPANY (a corporation),  
W. A. DIKEMAN, JOHN BEATON, THOMAS P.  
AITKEN, RAE B. CARTER, P. F. STIMLEY and  
TOM DAVIS,

*Appellees.*

**BRIEF FOR APPELLANT.**

---

WILLIAM A. GILMORE,  
JAMES E. FENTON,  
E. COKE HILL,

*Attorneys for Appellant.*

FILED

FEB 4 - 1918

U. S. CIRCUIT COURT OF APPEALS  
NINTH CIRCUIT  
SAN FRANCISCO, CALIF.



No. 3058

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

S. C. ADAMS,

*Appellant,*

VS.

YUKON GOLD COMPANY (a corporation),  
W. A. DIKEMAN, JOHN BEATON, THOMAS P.  
AITKEN, RAE B. CARTER, P. F. STIMLEY and  
TOM DAVIS,

*Appellees.*

## BRIEF FOR APPELLANT.

---

### Statement of Case.

This is a suit to quiet title to certain mining property described as the Anaconda Fraction and the Anaconda No. 2 situated on the left limit of Otter Creek, in the Otter Recording District, District of Alaska. The plaintiff in the court below (the appellant herein) claims the placer ground in controversy by reason of two locations, one known as the "Anaconda Fraction" made on the 23rd day of May, 1911 (Tr. pp. 35, 36, 37 and 38), and the other the "Anaconda No. 2" made on July 19, 1913 (Tr. pp. 46, 47 and 48), the latter including within



its boundary all of the ground embraced within the Anaconda Fraction, together with some additional ground.

The defendants (appellees herein) claim that they and their grantors located the ground in controversy in April, 1909, as part of the Prospector Association Claim.

It is conceded in the record (Tr. p. 78) that the said Prospector Association Claim at the time it was located and marked on the ground contained an area of 187 acres or an excess of 27 acres, and the notice of location of said Prospector Claim (Tr. p. 45) called for 5280 feet by 2640 feet or 320 acres.

It is undisputed in the record that appellant had permission from two of the eight locators of the Prospector Association Claim to stake the excess area off of either side or end of said claim. In March or April, 1911, before he located the Anaconda Fraction it is also admitted that most of the locators of said Prospector Claim were out of the country, or not in the mining vicinity at that time.

The appellant asserts he made the location of the Anaconda Fraction in May, 1911, after obtaining the consent of Chittie and Muckler, two of the eight locators of the said Prospector Claim, and one of whom (Chittie) was then in possession of the whole of said claim as such owner and lessee engaged in working the claim.

The appellant further asserts he made a diligent search (Tr. p. 58) to find some of the other owners of the Prospector Claim, most of whom were out of the country, and some of whom never did live in that vicinity.

Appellant further asserts that after 1911, and for more than two years after said owners knew that appellant had located the fractional excess, they neglected and failed to cast off the excess, and appellant to doubly secure his title to the ground in controversy, made a location of the Anaconda No. 2 Claim in July, 1913, taking in the excess ground, and notwithstanding the continuous notice and knowledge of appellees, that appellant was in possession, living upon and working the excess area, they still neglected and failed to cast off or correct their lines until more than six months after appellant had commenced this suit to quiet his title to the ground in controversy; that such conduct on the part of appellees showed a fraudulent intent on their part to hold more ground than the law permitted and rendered their claim void as against the appellant.

The appellant after locating the Anaconda Fraction in May, 1911, continued in possession of the ground during the year 1911 and performed mining operations on the same, and again in 1912 and in 1913, at all times in plain view and with the knowledge of appellees.

The appellant commenced this suit to quiet title on the 25th day of July, 1913, claiming in his com-

plaint (Tr. p. 3) the ground in controversy under his two locations and praying the court to quiet his title to same.

Thereafter the defendants filed their answer (Tr. p. 6) claiming that the ground in controversy embraced in the Anaconda Fraction and the Anaconda No. 2 was part and parcel of the Prospector Association Claim located by them and their grantors on the 10th day of April, 1909. To this the plaintiff replied (Tr. p. 9) alleging that the said Prospector Claim contained an excessive area to the extent of 27 acres, which the appellees with full knowledge of said excess neglected and refused to cast off.

Upon the issues thus made by the pleadings the cause came on for trial before the court which made its findings of fact and thereafter entered its decree on the 16th day of August, 1916 (Tr. p. 32), dismissing plaintiff's suit and adjudging the appellees to be the owners of the ground in controversy, from which decree the appellant appeals.

---

### Specification of Errors.

1. The court erred in finding, contrary to the evidence, that some of the owners (other than Chittic and Muckler) of the Prospector Claim were well-known in the vicinity of the ground in contro-

versy and were living in close proximity thereto (Assignment of Error No. 1).

2. The court erred in finding, contrary to the evidence, that as marked upon the ground the Anaconda Fraction's exterior boundaries did not cover or adjoin any boundary line of the Prospector Association Claim and that the Anaconda Fraction was not located at one end or one side of said Prospector Claim (Assignments of Error No. 2 and No. 5).

3. The court erred in finding, contrary to the evidence, that on and prior to July 13th, 1913, the locators and owners of the Prospector Claim had no notice or knowledge of the fact that the said Prospector Claim contained more than 160 acres or an excess area (Assignment of Error No. 3).

4. The court erred in finding, contrary to the evidence, that the southerly boundary line of said Anaconda No. 2 Placer Claim is not co-extensive with the southerly boundary line of said Prospector Claim (Assignment of Error No. 4).

5. The court erred in finding, contrary to the evidence, that the locators and owners of the said Prospector Claim did not acquire notice that said claim contained an excess in area until after the commencement of this suit (Assignment of Error No. 6).

6. The court erred in finding, contrary to the evidence, as conclusions of law, that the Anaconda Fraction and the Anaconda No. 2 placer claims



were and are null and void and that the said Prospector Claim was valid and entitled appellees to the possession of the ground in controversy as against the appellant (Assignment of Error No. 7).

7. The court erred, contrary to the evidence and law, in entering its judgment and final decree in favor of appellees and against appellant dismissing plaintiff's suit (Assignment of Error No. 8).

8. The court erred in not finding as a fact from the evidence that the locators and owners of the Prospector Claim had notice of the excess area contained within the exterior boundaries of said claim and failed to cast off such excess within a reasonable time after such notice (Assignment of Error No. 9).

9. The court erred in not finding as a fact from the evidence that the appellant did locate a portion of the excess area of said Prospector Claim off of the southerly side of said Prospector Claim in accordance with the request and consent of said Chittie and Muckler (Assignment of Error No. 10).

10. The court erred in not finding as a conclusion of law from the evidence that the consent of Chittie and Muckler that appellant could locate the excess area contained within the boundaries of the Prospector Claim was binding upon the co-tenants of said Chittie and Muckler in said Prospector Claim and that notice to them was also notice to their co-tenants and that appellant's locations

were good and valid and entitled him to the relief demanded (Assignment of Error No. 11).

11. The court erred in not making and entering its decree in favor of appellant for the relief demanded in his complaint (Assignment of Error No. 12).

---

### **Argument and Authorities.**

All the errors specified center upon and revolve around the contentions of appellant that the Honorable Trial Court, contrary to the law applicable, and the great weight of the evidence submitted, as disclosed in the record, erred in entering its decree for appellees instead of for appellant, based upon findings of fact and conclusions of law contrary to the evidence, and wholly unsupported thereby.

If this had been a law action, tried before a jury and the verdict had been for appellees, under the law applicable and the preponderance of the evidence, the trial court should have set aside the verdict by granting a new trial. So in this respect it being an equitable suit it is now here on appeal for this Honorable Court to review both questions of law and fact and to determine if the decision of the trial court by its findings was not only contrary to the evidence adduced at the trial, but in many instances wholly unsupported by any evidence whatever.

There is no serious conflict of legal principles in the case; neither are there many disputed facts.

Appellant contends that there has been a misapplication of legal principles to the facts admitted and proven at the trial.

**Contentions of Appellant.**

Appellant contends that at the trial it was proven conclusively, as shown by the record, as follows:

1st. That Chittie and Muckler, owners of an undivided one-fourth of the Prospector Claim, and Chittie as lessee of the whole thereof and then in possession, gave their consent, permission and authority to Adams, the appellant, to locate the excess area.

In support of this contention appellant directs the attention of the court to the following undisputed evidence as disclosed in the record:

S. C. ADAMS (Appellant)

(Tr. pp. 35 and 36) testified as follows:

“Q. Do you know where the Prospector Association was situated at that time?

A. Yes, sir.

Q. Did you ever locate any portion of the Prospector?

A. I did.

Q. When did you first make up your mind to locate a portion of the Prospector?

A. It was some time in the latter part of March or first of April in 1911.

Q. What, if anything, did you do when you made up your mind to locate that portion of the Prospector?

A. I had learned that Mr. Cash Chittie and Jim Muckler had an interest in the Prospector. And one afternoon in Conley's Saloon

in the presence of William Lang, Star Ballard and Charley Krutzinger, Mr. Cash Chittie and Mr. Jim Muckler were in the office and I told them that I wished to stake a fraction off the Prospector, as I considered it too large, and they informed me that if it was too large,—in excess of 1320 feet by 5280 feet,—that I could stake a fraction at either side or end that I wished.

Q. Let me get that right. What did they say to you?

A. They said that I could stake a fraction at either side or end.

Q. Not that. What I meant—something about 'too large'.

A. If it was in excess— (interrupted).

Q. I didn't understand that.

A. (continuing). Of 1320 feet by 5280, or 160 acres, as all they claimed was 160 acres.

Q. Who told you that?

A. Mr. Chittie and Mr. Muckler.

Q. How did Chittie and Muckler come to tell you that?

A. Mr. Chittie had been prospecting there, and Mr. Muckler lived up around Otter, and I told them the claim was too big, and they said if it was too big I could stake that fraction.

Q. What relation did they have to the claim?

A. They claimed they had an interest in the Prospector, and Mr. Chittie I believe at that time had a lay.

Q. What did you do then?

A. Along in May I believe it was the 22d of May, I measured the Prospector, William Lang and I. We hired a man by the name of Puntila to help us measure the Prospector.

Q. What did you do then?

A. We measured it and found it too wide, and made a discovery on the 22d—I believe it was the 22d—and on the 23d— (interrupted).



The COURT. 22d of what?

A. Of May, 1911. On the 23d of May we staked it—staked the Anaconda, 120 feet wide by 2640 feet long.”

Again, on cross-examination (Tr. pp. 55 and 56), S. C. Adams (appellant) testified as follows:

“Q. When was it that you say you talked to Cash Chittie and Jim Muckler?

A. It was some time the latter part of March or the first of April, 1911.

Q. And what did they tell you?

A. They told me that I could stake a fraction at either side or end that I wished, if the Prospector was in excess of 1320 feet by 5280 feet, as all they claimed was 160 acres.

Q. How did that conversation happen to come up at that time? Did you then know or have an idea that the Prospector was excessive?

A. I did. Yes, sir.

Q. When had you found that out?

A. There were different men I talked to that year and different interests being bought—some interests being bought in the Mohawk at that time. And I was figuring on getting hold of some ground if there was any ground to be had, and I had been over the Prospector and Mohawk many times.

Q. You had been over the Prospector before the 22d of May with a view of ascertaining if there was any excess?

A. If it was large. And I always thought it was large every time I had been over it.

Q. Did you tell Cash Chittie and Muckler that it was excessive?

A. I told them I thought it was large.

Q. What did you tell them, as near as you can recollect now?

A. I told them I thought it was in excess of 160 acres.

Q. But you never told them at any one time, as a matter of fact, that it was excessive?

A. Not to my knowledge.

Q. What reply did they give to you?

A. They told me at that time that if it was in excess of 1320 feet by 5280 feet that I could stake at either side or end that I wished."

CHARLES KREUTZINGER,

a disinterested witness, undisputed and unimpeached, testified as follows (Tr. pp. 104 and 105):

"Q. What was that conversation, as nearly as you recollect?

A. Well, it was in regard to staking some excess. I couldn't state word for word because I don't recollect; as I recollect it, is the best I can do. Well, Adams told, as I recollect, that the claim was in excess of 160 acres, and if they had any objection to his staking the excess, and they said 'No', as I recollect. I know that both of them agreed to—they were perfectly well willing that if there was over 160 acres, that it should be taken off."

Again, the same witness on cross-examination (Tr. p. 107) testified as follows:

"Q. I am asking you what you said about this Prospector Claim on that occasion.

A. Well, I have stated all I said at that time. Adams was asking Muckler about the claim. Adams said that the claim was in excess; I wouldn't be sure that he said 'excess'. He said it was too big, or in excess. I wouldn't be sure. I am quite sure he said it was in excess..

Q. Did he say to them that he had measured the claim?

A. No, not to my recollection. I don't know, whether or not I would recollect if he

had said it. Both of them answered Adams in this conversation. Muckler said it was all right with him. Chittie said similar. I don't recollect just what it was. Chittie said, to my recollection, that it was all right. I don't recollect whether they were all in the saloon or not, when I came in. I was in there collecting a bill. I had no interest in the matter at that time. This conversation took place at the time in the office, possibly they were all sitting in the office. I am not sure that they were. We all went out together and at one time we were all in the office together. I am positive that this conversation took place in the office. Sam Ballard was there. I don't recollect whether the bartender was in there or not. I don't recollect how long I had been there when Muckler and Chittie came in. I don't recollect who came in first. I recollect the talk about this excess. They talked about this claim being too big—the Prospector Claim. I remember that positively.”

There is not a syllable of testimony in the transcript to contradict these two witnesses on this point, and neither of the witnesses were impeached in the slightest particular, so it should be taken for granted that this contention was proved at the trial. The defendant John Beaton admits that Chittie was working on the claim in 1911 (Tr. p. 94). The same witness again (Tr. p. 97) says:

“C. C. Chittie and Andy Chittie worked on this claim in 1911. They had a written lease from the owners that was around there at the time.”

2nd. That the consent, permission and authority given by Chittie and Muckler to appellant and the

admission of notice thereby was binding upon all the co-tenants of said Prospector Claim.

While it may be conceded that there is some reason or logic why one co-tenant may not bind another co-tenant in transferring property without specific authority, there is neither reason nor logic why notice of excess in area to one co-tenant is not notice to all co-tenants and binding upon them. Where a mining claim is owned by a single owner, it is a simple matter to give him direct notice, but where a claim is owned by eight or more owners, as was the Prospector, many of whom were out of the country, and as a matter of fact, some of whom never were in the country (Tr. p. 96), and their whereabouts wholly unknown (Tr. p. 97), even to the co-tenants (Tr. p. 100), why would not notice to the co-tenant in possession suffice? Chittie was actually working the claim as owner and lessee when Adams notified them of the excess area. Does the law impose a duty on one seeking to locate the public domain wrongfully and fraudulently held by others to go to the uttermost ends of the earth to notify all interested in the ownership of the prior mining location, or is it sufficient to notify those in possession?

“Whether the license of one co-tenant to do a particular act with reference to the property of a co-tenant will protect the licensee against the other co-tenant seems not well settled. On principle it would seem that where one co-tenant could himself lawfully perform an act with reference to property belonging to the



tenancy he could lawfully authorize another to do the same thing."

Snyder on Mines, Section 1471;

Southern Railway Company v. Meaher, 238  
Fed. 538.

Chittie, a co-owner, could have surveyed the mine and cast off the excess to protect his own rights, regardless of the other co-owners. Then why could he not delegate this authority? In the record we find that one of the co-owners (the Yukon Gold Mining Company), without consulting any of the other co-tenants of the claim, in January, 1914, caused the claim to be surveyed and cast off a portion of the claim as excess without consulting any of the other co-tenants whatever. Then why should they complain because Chittie and Muckler granted the license or permit to appellant Adams to stake the excess off one side or one end?

The general rule seems to be that one co-tenant cannot bind another co-tenant, unless specific authority is granted, except in such cases where the law imposes a duty on him to act to preserve his own estate such as in the case at bar. It was the duty of Chittie and Muckler to either grant permission to the appellant to stake the excess or to measure their claim and cast off the excess in order to protect their rights.

Crary v. Campbell, 24 Cal. 634;

Sharkey v. Candiani, 85 Pac. 219 (Oregon);

7 L. R. A. (N.S.) 809.

In this latter case Candiani staked in part of a claim owned by Sharkey and his co-tenants. They stood by and permitted him to develop the claim. The Supreme Court of Oregon said:

“To allow them to assert an adverse claim to that part of the Doctor lode now in controversy as it should be surveyed, would be violative of every principle of equity, and result in rewarding them for encouraging the development of the property. Zimmerman who owns five-twelfths of the Lucky Boy group of mines, resides in Portland, and though he knew Candiani had located a mine in the Blue River District, he was not aware that it conflicted with either claim in which he was interested. Frank C. Sharkey as Superintendent and Managing Partner, however, represented Zimmerman and also his predecessor in interest, Moore, in supervising the property; and, though such agent could not ordinarily, without special authority from all the co-tenants abandon any greater interest than he alone possessed, (*Beers v. Sharpe*, 44 Ore. 386; 75 Pac. 717; *Conn v. Oberto*, 32 Colo. 313; 76 Pac. 369), the character of his employment and the kind of property in controversy induced the conclusion that he possessed sufficient authority from all the co-tenants to bind them by his negligence in permitting Candiani to take, hold possession of, and improve their property for such a length of time.”

3rd. That appellant located the Anaconda Fraction on May 23rd, 1911, according to such consent and at the place and in the manner indicated by Chittie and Muckler.

4th. That said Chittie and Muckler thereafter knew that appellant Adams had staked the excess area of their said Prospector Claim.

This is conclusively shown by the testimony of A. A. Chittie, a brother of C. C. Chittie (Tr. pp. 111-12-13) as follows:

“Q. Now, in the year 1911, say in the month of September, did you have any conversation or meeting with C. C. Chittie relative to a conversation supposed to have taken place between him and one S. C. Adams, in which the subject of the location of a fraction of the Prospector Claim by Adams came up?

Mr. Hill objected to that unless Adams was present. It is attempting to prove statements to their interest. This is not competent.

The COURT. Just ask whether or not there was any conversation. That may be answered or not.

Mr. RODEN. Did any such conversation take place?

A. It did, in Flat City, at our house; at our home, C. C. Chittie's and mine. I don't think there was anybody but myself present at the time.

Objection by Mr. Hill as not in any way binding upon plaintiff, and strictly hearsay. It is simply a conversation concerning some other conversation.

Objection sustained. After argument:

COURT. I think the shortest way is to allow the question to be answered, subject to your objection, Mr. Hill.

A. He said in regard to Adams staking the fraction, that he had met Adams, and he has said that he had staked a fraction off of the Prospector Association; and he said he had met Adams, who had said: ‘I have staked a fraction on the Prospector Association, so I don't suppose we shall be very good friends now.’ And my brother said: ‘I don't see that that will make any difference as to our being good friends. If the Prospector was in excess of 160 acres, I would just as soon see you stake

it as anybody else.' I should judge this conversation took place in September, 1911.

Q. Now, in reference to this conversation, did your brother say what he had told Adams with reference to casting off on the Prospector, in case there were any?

Mr. Hill objected to that as incompetent and irrelevant, and as not tending to prove or disprove any conversation which C. C. Chittie may have had with Adams.

WITNESS (continuing). I asked him what he had done about it, and he said he had asked Adams where he had located it, and Adams told him he had located it between the Prospector and the Mohawk Association; and my brother said he didn't think that there would be any fraction exist there, not by his consent; he thought he understood in Fairbanks that the first staker had the right to say where the first fraction should be set off, and not by his consent would it be set off there; that he could have it on the side, or on the lower end, that is if one existed."

This notice and knowledge of the fact that appellant Adams had staked a fraction, claiming an excess area of the Prospector Claim, was clearly brought to the attention of C. C. Chittie, one of the co-tenants, in the year 1911, according to the above testimony of his brother, which was offered and received in evidence over the objection of the appellant. It conclusively proves that Chittie had notice that there was an excess area in the Prospector location. In 1911 he was the lessee of the other owners, in the care and custody (Tr. p. 75) and in possession mining the ground, still no effort was made thereafter to cast off the excess until long



after Adams, the appellant, had restaked the ground as the Anaconda No. 2, and had commenced this suit to quiet title.

5th. That such notice of claim of excess area to Chittie and Muckler was sufficient notice to bind all of the tenants of said Prospector Claim.

“Where one tenant in common acts for all the others in the care and charge of premises held in common, his knowledge will be attributed to his co-tenants.”

Ward v. Warren et al., 82 N. Y. 265.

In this same case the court at page 269 says:

“Where one tenant in common acts for all the tenants, there is no reason why his knowledge may not be attributed to his co-tenants just the same as the knowledge of any other agent could be. What the agent knows about the use of an easement in the premises committed to his charge would be attributed to his principal. Suppose tenants in common should place an improved farm in the charge of an agent, and then be absent for more than twenty years, could they defend against an easement claimed to have been acquired in the meantime, on the ground that they did not have personal knowledge of the easement, although their agent had such knowledge? And it certainly can make no difference that one of the tenants in common acted as agent for his co-tenants.”

See also Wade on Notice, Section 672.

The trial court in its decision (Tr. p. 14) says:

“Plaintiff contends that having entered under the permission thus extended, the remaining co-owners, being tenants in common,

were bound by the act of their co-tenants. I am satisfied this contention cannot prevail."

The trial court completely overlooked and ignored the plain legal proposition arising from the evidence that the other co-tenants were bound by the notice and knowledge of Chittic and Muckler.

The cases cited by the trial court in its decision (Barson v. Mulligan, 16 L. R. A. 151, and O'Hanlon v. Ruby Gulch M. Co., 135 Pac. 913, and other cases cited) are not in point and have no application whatever to the facts in this case. These cases would be in point where one co-tenant attempts to transfer or part with the title to land in which other co-tenants have an interest in common without any specific or direct authority. None of the cases cited by the court even intimate that a co-tenant in possession, and having the care and custody of the tenancy, is not the agent for all of the others to receive notice similar to the notice and knowledge claimed to have been given in this case.

6th. That such notice of claim of excess area by appellant Adams was sufficient then and there to put all the co-tenants upon inquiry, and if they disapproved of his said Anaconda fraction location, they should have cast off the excess area from some other part of the claim within a reasonable time thereafter, which they failed to do.

Where an excessive location of a mining claim has been made through mistake in good faith, as

where the locator sets his stakes and estimates his distances without chain or compass, it is void only as to the excess, but the locator upon acquiring knowledge or notice that the claim contains an excess area must within a reasonable time draw in his lines and cast off the excessive area, otherwise his claim is fraudulent and void against a subsequent locator who locates the excess area.

This doctrine is supported by the following cases:

- Gohres v. Illinois Mining Co., 40 Ore. 516;
- Stemwinder Mining Co. v. Emma & L. C. Consolidated Mining Co., 21 Pac. 1040; affirmed in 149 U. S. 787;
- Richmond Mining Co. v. Rose, 114 U. S. 576;
- Walton v. Wild Goose M. & T. Co., 123 Fed. 209;
- Zimmerman v. Funchion, 161 Fed. 859;
- McIntosh v. Price, 121 Fed. 716;
- Waskey v. Hammer, 170 Fed. 31;
- Jones v. Wild Goose M. & T. Co., 177 Fed. 99;
- Lindley on Mines, Section 362;
- Snyder on Mines, Section 398.

In the Jones case (*supra*) this court says:

“So in the case at bar, had the plaintiff Jones after giving the owners of the Navajoe notice of the excess waited a reasonable time for them to exercise the right to select and cast off, and then relocated the Papoose Fraction, a very different question would be presented.”

That was exactly what Adams did in the case at bar. He staked his Anaconda Fraction in May,

1911, where Chittie and Muckler told him he could stake the excess and after they knew, as Chittie's brother testified, that Adams had staked the excess, they failed, refused and neglected to cast off the excess at any other part of the claim or to draw in their boundary lines in any manner whatever, and Adams after having a written notice served upon him by one of the co-tenants (the Yukon Gold Company) (Tr. p. 44), in order to secure and protect him in his title to the ground, relocated the ground on July 19th, 1913, and named it the Anaconda No. 2 Claim, this relocation being made more than two years after Chittie and Muckler knew that there was an excess area in the Prospector Claim.

In the Jones case Justice Gilbert in dissenting held that under the facts disclosed, the Wild Goose Mining & T. Co., in waiting from September to November, waited an unreasonable time to cast off the excess and that such waiting rendered fraudulent and void the Navajoe location as against the Papoose Fraction. If two months was an unreasonable time in the Jones case, and if as the court intimated, as quoted above, that had Jones relocated the fraction, a different question would have been presented, then surely the trial court in the case at bar should have found as a fact from the testimony that it was an unreasonable time for the owners of the Prospector Claim to wait from April, 1911, to January, 1914, before attempting to cast off the excess area of their claim, and



especially was it an unreasonable time to wait six months longer after this suit was commenced by the appellant before casting off. The appellant commenced his suit on the 25th day of July, 1913, and the Yukon Gold Company, one of the appellees, caused the claim to be surveyed and the excess area cast off in January, 1914, six months after the suit was begun, and especially was this unreasonable in view of the fact that it is admitted in the record that the town of Flat was located on a part of the Prospector Claim where the owners of the claim had easy access to all methods of measuring and surveying that could have been completed in twenty-four hours, as the appellant testified (Tr. p. 50) that that was the time it took him to measure the claim in May, 1911.

7th. That the locators and owners of said Prospector Claim knew that during 1911, 1912 and 1913, appellant was living upon, improving, working and mining the said excess area as a fractional placer claim and within the exterior boundaries and stakes of the said Prospector Claim, still they neglected, refused and failed to cast off the excess area or correct exterior lines of the Prospector Claim.

The evidence clearly preponderates in favor of the proof of this contention. In addition to the testimony quoted above of the notice to Chittie and Muckler, we further cite to the court from the transcript further evidence of notice on the part of the owners of said Prospector Claim.

Appellant Adams testified, and there is not a word of testimony in the record to contradict him, as follows (Tr. p. 39):

“Q. Did you do any work on that claim in 1912?

A. Yes, sir.

Q. I mean on your claim.

A. On the Anaconda; yes, sir.

Q. What did you do in 1912?

A. William Lang and I in 1912 sunk a *hold* and put some drifts in in 1912.

Q. What was the value of that work in 1912?

A. It was over \$100.00 worth of work.

Q. Did you do any work there in 1913?

A. Yes, sir. In 1913 I gave a lay on the ground and sunk a hole 27 feet deep to bed-rock.

Q. Did you sink that hole yourself?

A. I helped sink the hole. Yes, sir.

Q. Did you do any work in 1914?

A. In 1914 I did.

Q. What did you do in 1914?

A. In 1914 I sunk, I believe it was, five holes and cleared timber on the upper end. And also in 1913 I rocked all the gravel out of that hole that we sunk in January.

Q. What was the result of your rocking?

A. I found some gold.”

While appellant Adams was living on the claim in January, 1913, working the ground with a boiler and windlass, he was served with a written trespass notice by the Yukon Gold Company, one of the co-tenants, as testified to by him as follows, which is uncontradicted in the evidence (Tr. p. 44):

“Plaintiff’s Exhibit 3—Letter, dated January 13, 1913, the Yukon Gold Company to S. C. Adams:

‘Flat Creek, Alaska, January 13, 1913.  
Mr. S. C. Adams,  
Flat City.

Dear Sir:

You are hereby notified that notices, of which the enclosed are copies, have been posted on the Mohawk and Prospector Association claims, and unless you immediately desist from trespassing thereon, and depart and remain away therefrom you will be prosecuted for trespass in the manner provided by law.

Very Respectfully,

THE YUKON GOLD COMPANY,

By J. Rivers.’

Q. I will show you Plaintiff’s Exhibit 3 and ask you if you ever saw that before.

A. Yes, I did.

Q. Where and when?

A. I believe it was January 13th or 14th. I believe it was Mr. Rivers or Kettlewell handed it to me. I would not say which one did. It was when I had a boiler and windlass and was working on the Anaconda Fraction.

Q. Were you on any other part of the Prospector at that time?

A. No, sir.”

We direct the court’s attention to the further fact that this notice was served on the appellant Adams on January 13th, 1913, and that subsequently on the 19th of July, 1913, the appellees had still neglected to survey their claim and cast off the excess, and that on said date Adams made his relocation called the “Anaconda No. 2”, and shortly thereafter commenced this suit to quiet his title to the ground.

We further direct the court’s attention to the fact that it was a whole year after serving this

trespass notice upon Adams that The Yukon Gold Company hired a surveyor to survey the claim and cast off the excess, notwithstanding the fact that on the 13th of January, 1913, Adams, with a boiler and windlass, was working the excess ground claimed by him.

The appellant testified (Tr. pp. 48 and 49) that he met Mr. Austin, the manager of The Yukon Gold Company, in August, 1912, and told him about the Anaconda Fraction.

Again, appellant testified (Tr. p. 65) that Mr. Austin had a blue print which showed the Anaconda Fraction.

Mr. Austin, who was conceded to be a mining engineer of large experience (Tr. p. 90), in his testimony for the appellees (Tr. p. 79), admits that he was the resident manager of The Yukon Gold Company where the property was located in 1912, and that he had a conversation in August with Mr. Adams. Again (Tr. p. 80), Mr. Austin testified as follows:

“Q. At that time did he explain to you where the Anaconda Fraction was located?

A. Yes, sir. He did.

Q. Where did he say?

A. He told me that the claim was located between the Prospector and Mohawk Associations.

Q. Did he say anything about the Anaconda Fraction being a portion of the original Prospector location?

A. No, sir. He did not.



Q. At that time, did you show him a map of the Prospector claim and adjoining claims?

A. Yes, sir."

Again (Tr. p. 83), Mr. Austin testified as follows, referring to a blueprint:

"Q. There were pencilings on it that you and Adams made at that time?

A. I think we did make pencil marks on it at that time. Mr. Adams drew a sketch of his property and I think I sketched it in on this map."

Again (Tr. pp. 88 and 89), Mr. Austin testified as follows:

"Q. Did you go to the stakes?

"A. Yes. Not to the stakes. Not to all stakes of the claim; I went to this stake (indicating on map) and found that the Prospector and the Mohawk stakes were at the same point. They were common stakes. There was a common corner for the two claims.

Q. Did you see the Anaconda stake at that time?

A. Yes.

Q. And you didn't take the trouble to go and find out where the other Anaconda stakes were, did you?

A. No, sir.

Q. You knew at that time that Adams was claiming a fraction there 120 feet wide, didn't you?

A. Yes, sir. He told me that. He told me that he was claiming a fraction there and wished to sell it.

Q. He told you the size of it?

A. He probably did. I don't just recall.

Q. He marked it out for you on the map?

A. Yes, sir. Drew a sketch of it.

Q. And some of the other owners of that ground talked to you about that fraction about that time, didn't they?

A. I inquired from some of the owners. I can't recall who they were. I think Mr. Aitken is one, but I am not certain. I discussed it with some of the owners.

Q. Prior to that, William Lang had come to you. He also claimed to be an owner and was an owner, if there was an Anaconda Fraction. He had come to you before that.

A. Yes, sir.

Q. He had also discussed with you the Anaconda Fraction.

A. Yes."

How in the face of this testimony could the trial court find appellees didn't know Adams was claiming an excess in 1912?

8th. That defendant to protect himself perfected his location of the Anaconda No. 2 claim on July 19th, 1913, after more than a reasonable time had elapsed within which said locators and owners of said Prospector Claim should have cast off the excessive area or corrected their lines.

9th. That after this suit was commenced on the 25th of July, 1913, the appellees waited an unreasonable time before attempting to cast off the excess area in January, 1914, thereby rendering their said placer claim fraudulent and void as against appellant, even if we concede for argument appellees had no knowledge of excess prior to commencement of suit.

What is a reasonable time rests upon the facts in each case. The time of the year, the character of the ground, the proximity to the means of making a survey, etc., determines the reasonableness. In the case at bar several seasons were allowed to go by. Chittie and Muckler knew of the excess area in 1911. The town of Flat was upon part of the claim making it particularly easy and accessible to acquire the means of making a survey. Several summers were allowed to elapse where the days are twenty-four hours long. Plats of the ground had been made, and discussed as shown by the evidence of some of the witnesses, stakes had been examined and compared, and trespass notices had been served upon appellant while he was living and working upon the ground in controversy as time went by, but not a single act or thing was done by one of the various owners or their representatives, in disapproving in any manner of the location by appellant of his fraction until after he had relocated the ground and commenced his suit to quiet title. Then after over six months' further time had elapsed, one of the co-tenants (The Yukon Gold Company) caused the ground to be surveyed and attempted to cast off the portion of the claim other than the part located by Adams (Tr. p. 86).

The trial court in rendering its decision (Tr. p. 17) decided that the Anaconda Fraction and the Anaconda No. 2 were fraudulent and void because they were "Shoe String" locations, claiming that

the said claims were not located "as near as practicable with the United States System of Public Land Surveys and rectangular subdivisions of such surveys," and deciding also that there was no necessity for the appellant to stake the said fractions in the manner and shape that they were staked.

The testimony in the case shows that there was a necessity for staking the said fractions in the shape they were staked. The record is undisputed in this regard. It shows that the ground to the south of the Prospector Claim, and bordering upon the southerly line of the Prospector Claim, was appropriated and staked as the "Mohawk Association Claim." Chittie and Muckler told Adams that he could stake the excess fraction off of either side or end of the Prospector Claim. Adams measured the claim and found it was 125 feet wider than the law permitted (1320), and that it was 50 to 75 feet longer than the law permitted (5,280). The record shows that Adams had made a discovery in Flat Creek and it was necessary to take in his discovery (Tr. p. 71). Adams also testified that he staked the fraction off the southerly side of the claim lengthwise along the claim for the purpose of leaving the Prospector in a rectangle, 1320 feet wide by 5280 feet long (Tr. pp. 69 and 70).

The Land Department in the "Snowflake" case, 37 L. D. 250, specifically states that a locator, when necessity compels him, may stake a fraction in any irregular shape and the question of the neces-



sity for so staking in each case is considered separately by the Land Office when application for patent is made.

“The present attitude of the Department, however, as announced in the case of the Snowflake (37 L. D. 250) discourages, if not inhibits, the laying of the lines of a placer claim over prior claims or other segregations. It now permits locations of irregular shape to be made conforming to boundaries of other claims, which eliminates the necessity of making locations in rectangular form for the purpose of securing odd fractions not included in the boundaries of previous locations, a method which, as we have seen, at one time was not favored by the Department.” Lindley on Mines, 3rd Edition, Section 448-R, also see *Stefjeld v. Espe*, 171 Fed. 825.

The case relied upon by appellees, and cited by the trial court (*Hanson v. Craig*, 170 Fed. 62), was a claim that had been located where there was plenty of virgin, unappropriated public domain, and the facts in the case showed that the locators shifted their stakes from a mile in length to two miles, and for other purposes than mineral appropriation. Most of the “Shoe String” cases mentioned by the courts and the Land Office were irregular claims usually staked for the purpose of corralling or controlling the water in the vicinity where located, or for other purposes than for mineral purposes. We fail to find a single case that holds that a claim like the Anaconda Fraction staked, where all the surrounding ground was appropriated mineral ground, has been held to be a “Shoe String” Claim.

The Land Department in the Snowflake decision, page 257, says:

“Exception to this rule may be permitted where by reason of prior patents, or other recognized segregations, a tract of vacant land of irregular form is vacant and subject to appropriation, such irregular tract may be located conforming to the boundaries of the segregated tracts. It is possible that other deviations from the rule of conformity may be sanctioned, but the circumstances must be such controlling force that it would be manifestly inequitable to refuse to recognize them. This is a question which must be determined as each case is presented, it being impossible to prescribe any definite rule, which should control all cases.”

The court in its decision, and also in its findings, ruled that the appellant had carved his fractions out of the Prospector Claim without making the boundary lines conform or coincide with the original lines of the Prospector. The trial court also says that Adams by his locations had given the Prospector a new or different course or direction. There is not the slightest bit of evidence in the case to support such a finding or ruling. The appellant Adams is uncontradicted in the record in his statements of where and how he located his fractions. See page 38 of the transcript where Adams testifies that he tied his Anaconda Fraction to the Mohawk Association Claim, and that the southerly boundary line was the southerly boundary line of the original Prospector. Again, on pages 47, 48 and 49, appellant testifies to the position of his

fractions and the manner in which he tied them to the Mohawk Claim. Again, on page 51 of the transcript, appellant tells where the lines of the Prospector and Anaconda Fractions were. Again, on page 63, appellant states where his boundary lines were. Again, on page 74 of the transcript, appellant shows that the map (Defendant's Exhibit A) was incorrect in not correctly showing the lines of the Anaconda Fractions.

The appellees never offered any evidence whatever by a single witness to contradict appellant in his testimony as to where he staked his claim. The appellees offered a certain map (Defendant's Exhibit A) (Tr. pp. 76 and 77) in evidence, and the same was received in evidence without any proof of who made it, or whether it was correct or incorrect, with the distinct stipulation in the record (Tr. p. 76) that the map was only for showing and giving a general idea of the properties, but that the markings were admitted not to be correct.

Apparently the trial court ignored the sworn testimony of Adams and looked at this map that was for illustration only and decided that the map was correct and Adams was wrong. There was not a surveyor or other person placed on the stand to be subjected to cross-examination to ascertain whether or not the map (Defendant's Exhibit A) was correct or incorrect. The map is not evidence at all.

Appellant was shown the map (Tr. p. 74) and was particularly questioned with reference to the lines

of the map and he explained that there was an error in the same and yet appellees did not consider the matter of enough importance to call the surveyor, or any other witness, to contradict him. In the face of the testimony of appellant Adams, how could the court be justified in making its findings that Adams in staking his fractions did not stake on one side or did not by his exterior boundaries cover or adjoin any boundary line of the Prospector Association Claim, and that in so doing, the southerly boundary line of the Anaconda No. 2 was not co-extensive with the southerly boundary line of the Prospector Claim? It was on such erroneous findings the trial court based its decree.

Finally, to summarize, we contend that we have conclusively shown from the record that the trial court erred.

- 1st. In finding that appellant in staking his Anaconda Fraction and Anaconda No. 2 Claim did not cover or adjoin the boundary line of the Prospector Association Claim, or stake on one side thereof.
- 2nd. In finding that the southerly boundary line of the Anaconda No. 2 was not co-extensive with the southerly boundary line of the said Prospector Claim.
- 3rd. In finding that on and prior to July 19, 1913, the locators and owners of the said Prospector Claim had no notice or knowledge that their said claim contained an excess area.



- 4th. In finding that the locators and owners of the said Prospector Claim did not acquire notice or knowledge that their said claim contained an excess area until after this suit was commenced.
- 5th. In finding that the Anaconda Fraction and the Anaconda No. 2 Claim were null and void as against the said Prospector Claim.
- 6th. In finding that the said Prospector Claim was valid as against the Anaconda Fraction and Anaconda No. 2 Claim and entitled the appellees to possession of the ground in controversy.
- 7th. In refusing to find that the said Prospector Claim was fraudulent and void as against the appellant's locations for failure and neglect to cast off the excess area after notice and knowledge thereof.
- 8th. In entering its judgment and final decree in favor of the appellees and against the appellant, dismissing appellant's suit based upon such erroneous findings.

As we said in the beginning of our argument there was very little conflict in the testimony. The appellees simply contented themselves by denying they had notice or knowledge of the excess area and by proving the location of the Prospector Claim. There was no dispute about the location of either claim. The legal questions raised herein practically all arise on admitted or undisputed facts

in the record. We repeat the Honorable Trial Court made its findings contrary to the facts proven at the trial, and thereafter incorrectly applied the law applicable thereto.

We submit therefore that the case should be reversed on both the findings of fact and the law and that the trial court be directed and ordered to enter its final decree in favor of the appellant in accordance with the prayer of his complaint.

Respectfully submitted,

WILLIAM A. GILMORE,

JAMES E. FENTON,

E. COKE HILL,

*Attorneys for Appellant.*



No. 3058.

---

IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT.**

---

S. C. ADAMS,

*Appellant,*

VS.

YUKON GOLD COMPANY (a Corporation),  
W. A. DIKEMAN, JOHN BEATON, THOMAS  
P. AITKEN, RAE B. CARTER, P. F. STIM-  
LEY and TOM DAVIS,

*Appellees.*

---

**BRIEF FOR APPELLEES.**

---

R. F. LEWIS,

RICHARD C. HARRISON,

HENRY RODEN,

*Attorneys for Appellees.*

---

*Filed this*.....*day of February, A. D. 1918.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

---





No. 3058.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

S. C. ADAMS,

*Appellant,*

VS.

YUKON GOLD COMPANY (a Corporation),  
W. A. DIKEMAN, JOHN BEATON, THOMAS  
P. AITKEN, RAE B. CARTER, P. F. STIM-  
LEY and TOM DAVIS,

*Appellees.*

---

## BRIEF FOR APPELLEES

---

### STATEMENT OF THE CASE.

This is a suit in equity brought by the plaintiff below and appellant in this court to quiet title to two portions of placer mining ground, situate in the Otter Mining and Recording District, Territory of Alaska; said two parcels of land being known and recorded respectively as "Anaconda Fraction Placer Mining Claim," and "Anaconda Fraction No. Two Placer Mining Claim." The first of the two parcels was located by appellant in the month of May, 1911, and is 120 feet in width by 2640 feet in length; the second location was made by appellant in the month of

July, 1913, and is, as described in its location notice 125 feet in width by 5280 feet in length; the second location embraces within its exterior boundaries all the ground covered by the first location.

The appellees in their answer set up that said two fractional placer claims are parts and portions of the "Prospector Association Placer Mining Claim," located and acquired by them and their grantors long prior to the location of either of said two fractional claims and that the latter two locations lie wholly within the exterior boundaries of said Prospector Association Claim and for that reason are void.

In his reply the appellant admits that said two fractional claims contain portions of said Prospector Association Claim but maintains that said Prospector Claim was excessive in area, as marked upon the ground, that defendants learned of such excess and failed to cast off the same, that appellant then attempted to take up such excess area by locating the "Anaconda Fraction" in May, 1911, and that in July, 1913, he located the "Anaconda No. 2," embracing all of the former location and some additional ground.

Both parties admit that the excess area contained within the Prospector Association Claim was taken in by honest mistake and without any design or intention of acquiring by one location made by eight persons, more than one hundred and sixty acres.

The appellant contends that he had a right to make his two fractional locations, thereby taking up the excess contained within said Prospector Association Claim, after he had obtained permission to do so from

two of the eight owners and locators of said Prospector Claim.

The appellees contend, *first*, that appellant failed to inform the locators and owners of said Prospector Claim that it was excessive in area, after he acquired knowledge thereof, either at the time he made his first or second location, or at all, and that appellees, after acquiring such knowledge, caused a survey of said Prospector Claim to be made and immediately after ascertaining that said claim was excessive in area cast off such excess, drew in their boundaries and corner stakes, made an amended location of said Prospector Claim and posted and recorded an amended location notice, and, *second*, that even if all the locators and owners of said Prospector Association Claim had full knowledge of the fact that said claim contained an excessive area and having such knowledge within a reasonable time failed to cast off such excess, the appellant nevertheless could not prevail for the reason that both his locations were made in such shape or form as is not countenanced by the laws of the United States, nor by local rules, customs or regulations, nor by the rulings of the Land Department, and that both of said locations are what has been described as "Shoestring Locations."

The contention in this case concerns the location of the excess area contained within the exterior boundaries of the Prospector Association Claim.

The cause was tried in the lower court by the Hon. F. E. Fuller in 1914, who, after hearing the testimony reserved his decision for some time and then



wrote his opinion in favor of defendants. The opinion is attached to this brief. Owing to the fact that said Fuller decided said cause at Fairbanks, Alaska, approximately one thousand miles from where the premises in controversy are situate and where the parties and their counsel resided, said judge allowed sixty days for the submission of findings of fact and conclusions of law and for filing of objections thereto, but before such findings could reach said Fuller he resigned as District Judge, leaving this cause decided by him in favor of defendants, appellees herein, but without findings of fact and conclusions of law or a decree signed by him. Thereafter the Hon. Chas. E. Bunnell, successor to said Hon. F. E. Fuller, tried the cause *de novo* and gave his decision, findings and decree in favor of defendants, appellees herein. From this latter decision the present appeal is taken.

### ARGUMENT.

The appellant asks this honorable Court to reverse the decree of the Lower Court upon certain errors alleged to have been committed by the Trial Court.

These assignments of error (as taken up by appellant in his brief) may be grouped into two classes, viz.:

*First:* The appellant claims the Lower Court committed error in finding as a fact that he, appellant, failed to give the locators and owners of the Prospector Association Claim an opportunity to ascertain that said claim contained an area in excess of one hundred and sixty acres and that after appellant knew of such excess he failed to give notice thereof to the appellees,

except as to two of them, and failed to give them an opportunity, except as to said two, to cast off such excess.

*Second:* The appellant claims the Lower Court committed error in finding as a fact that he could have located the excessive area contained within said Prospector Association Claim in some more compact form than was done by him, and that he made, what has been termed "Shoestring locations", when he located his two fractional claims.

We will proceed to consider whether or not these findings of the Court are supported by the evidence and law as applicable to this case.

(1) *Did the Court err in finding that the locators and owners of the Prospector Association Claim, except the locators and owners Chittic and Muckler, prior to the locations made by appellant, never knew that said Prospector Association Claim contained an area in excess of one hundred and sixty acres?*

It is fully established by the testimony, without contradiction, that the Prospector Association Claim was located on the 10th day of April, 1909; that the boundaries thereof were marked upon the ground so that the same could be readily traced; that a substantial discovery of gold was made by the locators within the exterior boundaries thereof and that a properly executed location notice was posted and recorded in the office of the recorder in whose recording district the premises are situate. (Test. of John Beaton, Pr. Rec., p. 91 *et seq.*)

There is no contention made by appellant that the location of the Prospector Association Claim was made fraudulently or that the excess area was taken in otherwise than by honest mistake.

It is clear then that this case comes squarely within the rulings of this honorable Court in "*Jones vs. Wild Goose Mining and Trading Company*", where it was held that the original locator and his grantor, has the exclusive right to the possession of the entire location, including the excessive area, until notice of the excess has been brought home to him and an opportunity afforded him to cast off such excess.

"A placer claim located in good faith is not wholly void because it is in excess of twenty acres (160 acres in case of association claim located by eight persons) but it is void only as to the excess which may be rejected from any portion the owner may select and until he has been advised about the excess and has had a reasonable time to make his selection, his possession extends to the entire claim, and another who goes upon it and makes a location of any part is a trespasser and his location a nullity and void for any purpose."

*Jones vs. Wild Goose M. & T. Company*, 177 Fed. 95.

On the 23d of May, 1911, when appellant made his first location, the following named persons were the locators and owners of said Prospector Association Claim, to-wit: W. A. Dikeman, John Beaton, John Duncan, Ira Van Orsdale, P. F. Stimley, Tom Davis, James Muckler, Wm. Pillar, L. Blackburn and C. C. Chittick. (Pr. Tr., p. 114.)

It nowhere appears in the record that the appellant

made any honest effort to ascertain who the owners of said Prospector Claim were at the time he made his first location and he expressly admits (Pr. Tr., p. 62) that he never went to the recorder's office to learn who the locators and owners of said claim were although this office was but six or seven miles from where said Prospector Claim is situate. (Pr. Tr., p. 62.)

The only notice of the excess that he fairly tries to bring home concerns the two locators Chittick and Muckler, both of whom were dead at the time of the trial of this cause. (Pr. Tr., pp. 49 and 50.) But even as to these two, appellant admits to merely having made a suggestion to them of the possibility of said Prospector Claim being excessive. He testifies:

“Q. Did you tell Chittick and Muckler that it (the Prospector Claim) was excessive?

“A. I told them I thought it was.

“Q. But you never told them at any time as a matter of fact that it was excessive?

“A. Not to my knowledge.”

It is not shown that appellant made any honest effort to inform any of the remaining co-owners of the fact that said Prospector Claim was excessive. Several of these owners were well known in the camp and maintained homes on Otter Creek, on which creek said Prospector Claim is located. (Pr. Tr., p. 99 *et seq.*)

As it nowhere appears in the record that appellant made an honest effort to inform the owners of said Prospector Claim that it was excessive, except as to Chittick and Muckler, and as it nowhere appears that



they had knowledge of such excess, but, on the contrary, it does appear that they had not until after the commencement of this action (Pr. Tr., pp. 85 and 99), how then can appellant claim that the Trial Court committed error when it found that "On the 23d day of May, 1911, while said Prospector Claim was a valid, subsisting mining location and while the locators thereof and their grantees had no notice or knowledge that said placer claim contained an area in excess of 160 acres, except the locators Chittick and Muckler, plaintiff entered, etc."

It will be noticed that appellant, in his proposed finding of fact numbered 6 admits that some of the owners could have been reached by plaintiff and appellant had he made an honest effort to do so and that none of the owners, except Chittick and Muckler, had knowledge or notice of the fact that said Prospector Claim was excessive in area. This proposed finding reads:

"6. That between the time when plaintiff measured the Prospector Association and at the time when he staked the Anaconda Fraction, some of the owners of the Prospector were not in the vicinity of the Prospector and plaintiff did not give actual notice of his location of said Anaconda Fraction to any of said owners except Muckler and Chittick, etc." (See Pr. Tr., p. 21.)

And the Hon. F. E. Fuller, who first tried this cause, in his opinion hereto attached, comes to the same conclusions when he states, "Some of the owners of the Prospector were not in the vicinity, nor known to the plaintiff and their permission to locate any excess

was never obtained nor does it appear that they had knowledge thereof prior to the commencement of this action."

We respectfully submit that the Trial Court was justified under the evidence in finding that at the time appellant made his first location the locators and owners of said Prospector Claim had no notice or knowledge that said claim contained an excessive area except the locators Chittick and Muckler.

The situation was not different when appellant made his second location on the 19th day of July, 1913.

He clearly testifies (Pr. Tr., p. 68) that he did not see any of the then owners of said Prospector Claim and it nowhere appears that he informed them or that they had notice or knowledge of the fact that said claim contained an excessive area. And he never examined the records to ascertain the ownership of said Prospector Claim until "in this trial last year" and this testimony was given in 1915 and the "trial last year" was 1914.

In connection with the making of his second location the appellant again relies upon his conversation with Chittick and Muckler in April, 1911, and further claims that during the summer of 1912 he tried to sell various mining interests, including his first location, to the appellee, Yukon Gold Company, and that in that connection he mentioned his Anaconda Fraction to one E. A. Austin, the manager for said Yukon Gold Company.

Appellant's testimony upon this point is quite unsatisfactory and indefinite. He does not claim that

a map used during this conversation, showed clearly the location or designation of his fraction, and he infers that "Mr. Austin, as I took it, knew my fraction was there." (Pr. Tr., p. 65.) The witness, Austin, testifies (Pr. Tr., p. 80), that when this conversation took place the appellant explained that among several others he had a fraction between the Prospector and the adjoining Mohawk Association claim, that at no time did the appellant explain to him that his fraction was a portion of the original Prospector Claim and that appellant gave him to understand that he had acquired a strip of ground lying between two other mining claims, and that such strip, at the time of the location thereof, had been unappropriated public domain, and that the witness, upon investigation, found that no such fractional claim existed between said two claims. The testimony upon this point is as follows (Testimony of appellant, Pr. Tr., p. 64 *et seq.*):

"Q. So when you had the conversation with Mr. Austin you offered to sell him your Great Falls Fraction?

"A. Yes sir.

"Q. Between the Myrtle and the Mohawk?

"A. Yes sir.

"Q. Your Anaconda Fraction between the Prospector and the Mohawk?

"A. Yes.

"Q. And the North Butte?

"A. The North Butte, yes."

Testimony of E. A. Austin (Pr. Tr., p. 80 *et seq.*):

"Q. At that time (time of conversation) did

he explain to you where the Anaconda Fraction was located?

"A. Yes sir, he did.

"Q. What did he say?

"A. He told me that the claim was located between the Prospector and Mohawk Associations.

"Q. Did he say anything about the Anaconda Fraction being a portion of the original Prospector location?

"A. No sir, he did not.

"Q. In that map, does it show the location of the Anaconda Fraction as claimed by Mr. Adams?

"A. No sir, it does not.

"Q. (Pr. Tr., p. 85.) Did Mr. Adams ever tell you that he claimed a fraction off the Prospector claim?

"A. No sir.

"Q. Did he ever tell you that he had measured the Prospector and that there was an excess in it?

"A. No sir.

"Q. And ask you to cast it off?

"A. No sir.

"Q. When did you first become cognizant of the fact that Adams claimed it was more than 160 acres?

"A. During the winter of 1913 to 1914. I think it was in January, 1914.

"Q. That was after the commencement of this suit?

"A. Yes sir.

"Q. At the time of the commencement of this action did you have any knowledge or information that the Prospector contained more than 160 acres?

"A. No sir."

Cross-examined by counsel for appellant the witness said (Pr. Tr., p. 87):

"Q. What you thought he meant was that the



Prospector stake didn't come up to the Mohawk stake. Was that it?

"A. Yes.

"Q. You thought that he meant that there had been some absolutely vacant ground between the Prospector and the Mohawk?

"A. That the two stakes were not common."

Evidently the Trial Court gave credence to the testimony of the witness Austin and found (Finding of Fact No. 13) that the locators and owners of said Prospector Association Claim, except said Chittick and Muckler, did not acquire notice of the fact that said Prospector Claim contained in excess of one hundred and sixty acres until after the commencement of this action, and that after the acquisition of such knowledge caused said Prospector Claim to be surveyed, the excess cast off and an amended location thereof made.

The appellant would rely upon the legal proposition that having brought home notice of the fact that said Prospector Claim contained an excessive area to two of the owners and locators thereof, that such notice was notice to all. Such, however, is not the law and it is well settled that one tenant in common cannot bind his cotenant.

"One cotenant cannot abandon the claim because he cannot, by any course of conduct, destroy the interest of his cotenant."

*O'Hanlon vs. Ruby Gulch Mining Co.*, 135 Pac. 913.

In a suit brought by one tenant in common against his cotenant to restrain him from using more than

his share of the common waters, the Supreme Court of California say:

"One tenant in common, in so far as he interferes with and works an injury upon the joint property to the damage or injury of his cotenant, is a trespasser to that extent."

*Bardton Land Co. vs. Grafton Water Co.*, 152 Pac. 48.

"One tenant in common cannot by his conveyance, create an easement in the common land which would be good against any of the tenants, except himself."

*Pfeiffer vs. Mulligan* (N. Y. Ct. of Appeals), 84 N. E. 75; 16 L. R. A. (N. S.) 151.

"One tenant in common cannot prejudice the rights of his cotenants."

Lindley on Mines, 3d ed., p. 791.

"The deed of a cotenant purporting to convey a portion of the common estate by metes and bounds is inoperative as against his cotenants."

*The Hartford etc. Ore Co. vs. Miller*, 41 Conn. 112;

3 Morrison's Mining Reports, 353.

"The fact that two persons as tenants in common own coal lands does not authorize one of them to enter into an agreement which would bind his cotenant to sell the unmined coal in the absence of authority from his cotenant."

*McKinley vs. Peters et al.*, 3 Atl. 27.

"Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estates. This is the settled law and hence a conveyance by one tenant of a parcel of the general tract owned by several is inoperative to impair any of the rights of his cotenants."

Devlin on Deeds, 2d ed., p. 109.

These authorities, we respectfully submit, fully sustain our contention that the acts and declarations of Chittick and Muckler instructing or permitting the appellant to take up the excess area contained within the Prospector Claim were inoperative. They could not bind any of the cotenants of said Chittick and Muckler and they were not binding even upon said Chittick and Muckler unless they were ratified by their co-owners.

The authorities quoted by appellant in his opening brief, to sustain his contention that Muckler and Chittick were competent to bind their cotenants, are not in point.

The case of *Crary vs. Campbell*, 24 Cal. 634, was an action for damages brought by the plaintiff Crary against the defendants Campbell and Powell for having cut the embankment of a ditch and thereby having caused quantities of water to flow down plaintiff's flume by means whereof the flume was injured together with plaintiff's mining property. The defendants set up, among other things, that prior to the cutting by them of the embankment they had secured the consent to do so from "plaintiff's managing agents, one of whom was jointly interested with the plaintiff", and that said embankment had been cut with the consent and assistance of such agents. Upon the trial the defendants tried to prove that one of the plaintiffs and co-owners of the flume and property had given his consent to the cutting. Objection to this testimony by the plaintiff was sustained. On appeal the Court decided that it was error to exclude the proffered testi-

mony. We find no fault with this decision as the law is well settled that a release by one of several against whom a tort has been committed is a release by all.

The *Sharkey vs. Cadiani* case, 85 Pac. 219, 7 L. R. A. (N. S.) 791, was decided upon questions of abandonment and equitable estoppel, both of which were pleaded. The Court say, page 792:

"The answer having denied the material allegations of the complaint, averred that plaintiffs had abandoned all interest in the premises inconsistent with the boundaries of the Doctor Lode, and that by reason of their conduct they ought to be estopped to assert any claim thereto, setting out the facts which, it is asserted, constitute the alleged impediment which the law raises to preclude the maintenance of this suit."

In the *Cadiani* case the plaintiffs tried to recover a portion of mining ground originally located by them and taken in by the defendant when he made his location. It appears that when defendant staked the overlapping claim two of the plaintiffs assisted him in marking his boundaries and all the cotenants, except two, were on the ground and saw defendant develop the same during eighteen months at an expenditure of \$8000. The Court say:

"The right of the defendants to the Doctor claim (the overlapping location) depends upon acts of the plaintiffs constituting an alleged estoppel tantamount to an abandonment. It will be remembered that two of the cotenants made some markings on the ground to evidence part of the boundaries of the Doctor claim. All the cotenants, except Moore and Zimmerman were at the mines and saw *Cadiani* (defendant) working



on the Doctor claim to which for eighteen months they made no objections but congratulated him on the progress he was making in cutting the tunnel until he had expended about \$8000 and discovered valuable ore—Cadiani (defendant) was a novice in mining while Dyson and Standish and most of the other cotenants were experienced \* \* \*

The means of information were, therefore, not equal to the respective parties and this being so an estoppel may arise to prevent the plaintiffs from asserting their rights \* \* \* the plaintiffs, who are experienced miners \* \* \* ought to be estopped to assert that they had any interest in conflict with the claim of Cadiani \* \* \* to allow them to assert an adverse claim would be violative of every principle of equity and result in rewarding them for encouraging the development of the property.”

It further appears that Sharkey, who negligently failed to ascertain the boundaries of his and his cotenants' claim and who encouraged the development of the overlapping portion, was the “superintendent and managing partner” of the plaintiffs.

An examination of this case shows that it was decided solely upon the equitable principle of estoppel.

In the case at bar no such principle is applicable. The appellant, as already pointed out, was an experienced miner. He did no more upon the premises located by him than what was required under the law as annual assessment work and he has practically expended no money in developing this property. At no time did he act in accordance with equity and give the appellees any notice of his claim or attempt to give them notice and explain his position, but, on the contrary, he hid himself and induced the appellees

to believe that he had taken up a portion of unappropriated public domain, lying between the Prospector Claim and the Mohawk Claim. The appellee, Yukon Gold Company, as soon as it saw the appellant working in the vicinity of its properties and believing him to claim a fraction between said two claims, served a notice upon him, informing him that he was trespassing upon its properties and to desist therefrom. (Pr. Tr., p. 44.) Prior to this time the appellant had given E. A. Austin, the manager of said Yukon Gold Company, to understand that he had located his fraction between said two claims (Pr. Tr., pp. 85 and 87), and the said Austin thereafter investigated the location of this alleged fraction (Pr. Tr., p. 90) where he testifies on cross-examination as follows:

“Q. You did take the trouble to look it up, then?

“A. I took the trouble to look up and found out that the fraction did not lie between the Prospector and the Mohawk, which Mr. Adams claimed it did.”

Would it not have been fair and equitable for appellant to have informed the appellees of his true position, after the service of the trespass notice upon him, when that notice gave him full knowledge that they believed him to be on property which lawfully belonged to them? But instead of giving them notice, as the law required him to do, he kept silent and kept all knowledge as to the excess area in said Prospector Claim hidden from them. The appellant's position cannot recommend itself to the consideration of a court of equity. Counsel in their brief quote “Snyder on

Mines #1471," as authority for their contention that one tenant in common can bind his cotenant. Counsel only quote a portion of the section. An examination of the entire paragraph discloses that the author simply speaks of the right of one tenant to grant a lease or license to a third person to mine upon the common estate and in the same section says "if it is lawful for one tenant to work the common property in a prudent, safe and minerlike manner, there could be no question, it would seem, as to his authority to permit another to do so, provided, of course, that the cotenant not joining was not thereby injured to a greater extent than he would be if the cotenant granting the license mined it himself." This clearly applies to and concerns only the right of one cotenant to grant a lease or license to another to enter upon the common estate and there act for and in the place of the granting cotenant and has nothing to do with the right of one cotenant to cast off or abandon or dispose of a portion of the common estate.

In the case of "*Southern Railway Company vs. Meaher*, 238 Fed. 538," also cited by appellant in his brief to sustain his contention, the Court say: "That in a joint action by three plaintiffs to recover for the conversion of earth removed from a tract of land, there can be no recovery by any of the plaintiffs if one of them consented to the removal." And "In a suit by cotenants to recover for the conversion of earth removed there can be no recovery by any of the plaintiffs, if one of them consented to the removal. A plea that sets up that the damage was done by the

consent or direction of one of the plaintiffs, presents a good defence to the action, the plaintiff who consented could not recover, and all persons suing in the same action must be entitled to recover or none can.

Both authorities quoted are inapplicable to the case at bar.

On page 18 of his opening brief, counsel for appellant quote the case of *Ward vs. Warren et al.*, 82 N. Y. 265, as authority for their contention that notice to one or two cotenants is notice to all and that notice to Chittick and Muckler was notice to all their cotenants. Again an examination of this case discloses a state of fact entirely different from the facts in the case at bar. In the New York case one of the cotenants was the agent for the remaining cotenants and, of course, as such agent, he stood in the shoes of his principals and notice to him was notice to his principals. The Court say, "It was shown that the passage way across the defendants' lot had been used by plaintiffs for 48 years. The three defendants claim to have had no knowledge of the passage way but the trial court from the evidence found otherwise. We think there was evidence sufficient to sustain the finding that the user was with such knowledge. The defendants have had the personal charge letting them to tenants, keeping them in repair and collecting the rents. All these facts were submitted to the trial judge, although the defendants under oath denied any knowledge of the user, and it was for the judge to determine how much weight under the circumstances should be given to such denials and what the fact in



truth was, and during the whole period of time, since 1848 (to 1880 when the case was tried) one or the other of the brothers was the agent of all the owners for collecting the rents, letting and managing the premises. Where one tenant in common acts for all the tenants there is no more reason why his knowledge may not be attributed to his cotenants just the same as the knowledge of any other agent would be. What an agent knows about the use of the easement in the premises committed to his charge must be attributed to his principal." There is no testimony in the case at bar showing that Chittick or Muckler, or either of them were in any way in charge of the Prospector claim and it nowhere appears that they acted as agents or had any authority to act as agents of their cotenants.

The trial court found that none of the owners of said Prospector claim had any notice or knowledge concerning the excess except said two named persons and it was for the trial judge to weigh the evidence and say what in fact the truth was.

(2) *Did the Court err in finding that appellant could have located the excess area contained in the Prospector Association Claim in a more compact form than was done by him, and did he make a "Shoestring location"?*

Section 2331 of the Revised Statutes provides that claims upon unsurveyed public lands shall conform "as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys".

The general rule has been adopted by the Land Department that a (placer) mining claim located by one or two persons must be such as can be entirely included within a square forty-acre tract, in other words, that it must not exceed 1320 feet in length.

*In re Snowflake Placer*, 37 D. Dec. 250.

"It is the policy of the government to have the entries, whether they be of agricultural or mineral lands, in compact form. Congress has repeatedly announced this principle, and the Department has always and does now insist upon it. The public domain must not be cut into long and narrow strips, and no 'shoestring' claims should ever receive the sanction of this Department."

*Id.*

While it is true that the courts are not bound to follow the decisions of the Land Department, it is nevertheless an established fact that courts will give great weight to the opinions of the officers of the Department, whose especial duty it is to administer the Public Land Laws and will follow them whenever possible.

"The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons."

*United States vs. Moore*, 95 U. S. Reports, 160-163.

The statute in positive terms provides that mining locations must, *as near as practicable*, conform with the system of public land surveys and the rectangular subdivisions thereof.

This provision constitutes and is as much positive mining law as the provisions concerning the making of a discovery or the markings of the boundaries and it is as incumbent upon the appellant to prove that his locations conform "as near as practicable" with the system of public lands surveys as it is necessary to show that he made a discovery and marked his boundaries, and it is incumbent upon the court to give the statutory provisions "as near as practicable" some meaning.

That the two locations do not comply with the system of public land surveys is self-evident and appellant fails to show why they do not. The trial court expressly finds that he could have made both locations in some more compact form (Finding of Fact numbered 10) and the same finding was arrived at by the Hon. F. E. Fuller when he tried this cause. The latter in his opinion, hereto attached and made a part of this brief, says: "I am satisfied that it is incumbent upon a person making a location which does not conform to the rule, to establish by evidence the impracticability of conforming thereto. In other words, he must show by some evidence that on account of the situation of the land, and the area of land that is open for location, that it is impracticable to locate a tract in such form as is required by the rules of the Land Office. This the plaintiffs seems to me to have failed to establish in this case." Appellant in his opening brief argues that it was impossible to locate this excess area in a more compact form because "the record shows that the ground to the south

of the Prospector Claim was appropriated as the "Mohawk Association Claim."

But it is not shown that the excess could not have been located at either on the westerly or the easterly side of said Prospector Claim. Besides the question as to where to take up the excess area could not be affected or determined by the location of adjoining claims. It was not a question of taking up a portion of unappropriated land lying between portions lying between existing mining claims, but it was a question of taking up a portion of land of an already existing location. It could not be taken up outside the boundaries of the Prospector Claim. The appellant testifies (Pr. Tr., p. 69) that he tried, as near as possible to take up the entire excess and that this was more than twenty acres. He had then an opportunity to make the ideal location, contemplated by the rules of the Land Department and in conformity with the statute, and he was bound to observe the injunction that a placer location must conform, as "near as practicable," with the system of public land surveys.

The fact that appellant made his discovery at the place he made it, in Flat Creek, gave him no right to stake a portion of land averaging 127 feet in width and being 5280 feet in length, for the place where the discovery is made does not determine the shape of the location. But he could have taken up the excess area at the westerly end of said Prospector Claim in a compact form and still have taken in the place of discovery.



The fact that Chittick and Muckler told him to stake at either end or side of said Prospector Claim gave appellant no authority to make his shoestring locations, for they could not authorize him to disregard the plain provisions of the statute.

The question of "shoestring locations" has, to our knowledge, never come squarely before any court of last resort, but the point has been touched upon by this Honorable Court in

*Hanson vs. Craig*, 170 Fed. 62,

where this Honorable Court, speaking through Mr. Justice Ross, refers to the fact that the placer location under consideration in the Hanson-Craig case was two miles long and six hundred and sixty feet wide. The Court quotes the language of the Land Department, in *In re Snowflake*, *supra*, with approval and considers it pertinent to apply that language to the claim in controversy. In that case the location was about seventeen times as long as it was wide and this Honorable Court, by implication at least, frowned upon its shape. In the case at bar the first fraction located by appellant is twenty-two times as long as it is wide and his second location is more than forty-two times as long as it is wide and no reasons are advanced for their phantastic shapes.

There is not the slightest attempt to show compliance with the requirements of the statute and such locations cannot commend themselves to the consideration of the Court.

There is one other point raised in appellant's open-

ing brief to which we desire to reply. On page 31 of his brief appellant finds fault with the trial court for finding that he carved his fractions out of the Prospector Claim without making the boundary lines conform with the original lines of the Prospector, and he complains that the trial court based its findings upon a map not identified and not proven by any witness to be correct. An examination of the map in question, defendants' "Exhibit A," will show the divergence between the Prospector lines and the Anaconda lines and that the fractions are carved out of the body of the Prospector Claim, giving the latter claim a new course. Counsel in their brief seem to have overlooked the fact that the appellant testified to the correctness of the map himself and that it was therefore unnecessary to call any further witnesses upon this point. On page 69, Pr. Tr., the appellant testifies:

"Q. This map (defendants' Exhibit A) is correct, isn't it?

"A. As near as I remember."

We believe that we have shown wherein the findings of fact made by the trial court are supported by substantial testimony and that the conclusions of law drawn therefrom are correct and that the decree of the lower court should be sustained.

Very respectfully submitted,

R. F. LEWIS,

RICHARD C. HARRISON,

HENRY RODEN,

*Attorneys for Appellees.*

## DISTRICT COURT OF ALASKA,

FOURTH DIVISION.

DECISION.

By HON. F. E. FULLER.

No. 1521.

S. C. ADAMS,

vs.

YUKON GOLD COMPANY ET AL.,

*Plaintiff,**Defendants.*

This action was tried before the Court, without a jury, at the Special, July, 1914, Term at Iditarod, and decision reserved.

The plaintiff, in his complaint, alleges that he is the owner of the Anaconda Fraction Placer Mining Claim, 120 feet in width, by 2640 feet in length; and of the Anaconda Fraction Number Two Placer Mining Claim, 125 feet in width, and 5280 feet in length, the latter claim including within its boundaries the former.

The answering defendants set up that the defendant Yukon Gold Company is the lessee in possession, and owner of an undivided part of the Prospector Association Placer Mining Claim, and the other defendants allege that they are the owners of undivided parts of this claim, and the lessors of the Yukon Gold Company, and that the ground claimed by the plaintiff is within the boundaries of the Prospector Claim.

The plaintiff's evidence tended to show that on May 23, 1911, he placed stakes at the corners of the Anaconda Fraction claim and blazed trees along the boundaries thereof, and that prior thereto he had discovered gold-bearing gravel along Flat Creek, which runs through this location, and within the boundaries of this location; that subsequently he placed stakes at the corners, and blazed trees along the boundaries, of the Anaconda Fraction Number Two, which included the claim theretofore located as the Anaconda, but was five feet wider, and 2640 feet longer. Plaintiff also testified that he did more than \$100.00 worth of work on the ground during 1912, and also did some work in 1913.

The Prospector Association Claim, to which the defendants assert title, was located in April, 1909, by eight persons, and, as described in the location notice, was 1320 feet in width, by 5280 feet in length, and contained 160 acres, but it was conceded that as marked upon the ground, the claim contained about 177 acres, or more than 17 acres in excess of the amount allowed by law to be located.

The plaintiff became aware of this excess, and notified some of the locators of the Prospector thereof, and it seems that he was informed by them that in case there was any excess, they were willing that he should locate the same wherever he desired, leaving them a claim 1320 feet by 5280 feet. Some of the owners of the Prospector were not within the vicinity, nor known to the plaintiff, and their permission to locate any excess was never obtained, nor does it ap-



pear that they had knowledge thereof prior to the commencement of this action. The defendants contended that, as against the owners of the Prospector having no knowledge of any excessive location, the plaintiff could acquire no rights by his attempted location, inasmuch as they were simply tenants in common of the land, and that one co-tenant could not release any rights of his co-tenant, or convey any of his interests, without the authority so to do. In the winter of 1914, some months after the institution of this action, the defendant, Yukon Gold Company, caused a survey to be made of the Prospector Claim, and then established a new boundary at the lower end thereof, throwing off the excess of over 27 acres, but leaving the other boundaries undisturbed, and including within such boundaries all of the ground located by the plaintiff, except the small strip running across the ground so abandoned.

The defendants urged that the plaintiff's locations were entirely void, because not made in conformity with Section 2331 of the Revised Statutes, requiring claims made upon unsurveyed lands to conform "As near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys."

If the decisions of the Land Office and its regulations are to be followed, defendants' contention must be sustained. For following the decision in *In re Snowflake Placer* (37 L. D. 250), the rule has been adopted that a claim located by one or two persons must be such as can be entirely included within a

square 40-acre tract; in other words, that it must not exceed 1320 feet in length. Undoubtedly, the plaintiff could not obtain a patent to his claim, in the form in which it was located. While the courts may not be required to follow this rule rigidly, and undoubtedly should give some effect to the words of the statute "as near as practicable," I am satisfied that it is incumbent upon a person making a location which does not conform to the rule, to establish by evidence the impracticability of conforming thereto. In other words, he must show by evidence that on account of the situation of the land, and the area of land that is open for location, that it is impracticable to locate a tract in such form as is required by the rule of the Land Office in segregating a piece of land adapted to ordinary mining purposes. This the plaintiff seems to me to have failed to establish in this case. From the situation of the land it is not apparent that he could not have located his claim in a more compact form, and a location, the length of which is more than twenty times its width, does not seem to me reasonably to comply with the law. Although various decisions of the Land Office hold "Shoestring locations" invalid, the courts do not seem to have gone to that length; but the Circuit Court of Appeals for this Circuit seems to intimate that the construction of the law adopted by the Land Office is a proper one for the courts to follow. (*Hanson vs. Craig*, 170 Fed. 62.)

This conclusion makes it unnecessary to consider whether or not the plaintiff could have made any valid location within the boundaries of the Prospector Claim

as originally staked, under the permission he had from a part of the owners, and without the knowledge or consent of all, within the rules laid down in *Zimmerman v. Funchion* (161 Fed. 859); *Jones v. Wild Goose M. & T. Co.* (177 Fed. 95); *Price v. McIntish* (121 Fed. 716); *Sharkey v. Candiani* (48 Ore. 112; 85 Pac. 219; 7 L. R. A. [n. s.] 791).

Findings of fact in conformity with these views, and a decree dismissing the action, may be prepared and submitted. On account of the distance from place of trial at which the attorneys for the parties herein reside, defendants may have sixty days to prepare, serve and file their findings, and the plaintiff may have sixty days after service thereof within which to prepare and file any proposed amendments and objections.

Dated at Fairbanks, Alaska, September 18, 1914.

(Sgd.) F. E. FULLER,  
District Judge.











